

Volume 10

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

ORACLE AMERICA, INC.,)	
)	
Plaintiff,)	
)	
VS.)	No. C 10-3561 WHA
)	
GOOGLE, INC.,)	
)	
Defendant.)	
<hr/>		San Francisco, California
		Monday, May 23, 2016

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on next page)

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Monday - May 23, 2016

7:31 a.m.

P R O C E E D I N G S

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(The following proceedings were held in open court,
outside the presence of the jury:)

THE COURT: Good morning, everyone. Please be seated.

All right. Are we all set to go?

MS. HURST: We have a few exhibit housekeeping issues,
Your Honor.

THE COURT: Well, what do you mean housekeeping?

MS. HURST: There were some exhibits admitted by
stipulation that weren't moved into evidence, and Google would
like us to do that formally, and there are disputes about
whether a couple of other exhibits came into evidence.

THE COURT: Oh, my goodness. All right. This is not
housekeeping. This is what is the trial record. So don't call
it housekeeping.

MS. HURST: My apologies, Your Honor.

THE COURT: All right. Okay. Give me the first one.

MS. HURST: These are the ones that were admitted by
stipulation, Your Honor, that were not disputed and that we are
moving into evidence. These are the source code exhibits that
were part of the Zeidman stipulation, Your Honor.

Exhibit 623, Exhibit 9100, 9101, 9102, 9103, 9104, 9105,
9106, 9107, 9108, 9109, 9110, and 9111. And those were by

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1 stipulation on ECF 1901, Your Honor.

2 **THE COURT:** Any objection?

3 **MR. MULLEN:** No objection, Your Honor.

4 **THE COURT:** All of those will be deemed in the trial
5 record.

6 (Trial Exhibits 623 and 9100 through 9111 received in evidence)

7 **THE COURT:** What else?

8 **MS. HURST:** Your Honor, the next issue is this poster,
9 Exhibit 1028, which was described by Dr. Reinhold and offered
10 into evidence and received at trial record page 1452 at line
11 11, which I have the transcript excerpt here for the Court. It
12 was received without objection.

13 Google is, however, maintaining an objection to this
14 poster, which is how it was described. It was a poster in its
15 original form. And that's how it was received.

16 **THE COURT:** I remember that thing. What did I say
17 before?

18 **MS. HURST:** It was received, Your Honor.

19 **THE COURT:** What's the objection?

20 **MR. MULLEN:** I don't think there is actually an
21 objection, Your Honor. Our only point here is that if the
22 large poster board, which isn't exactly Exhibit 1028 -- Exhibit
23 1028 is a small piece of paper, that was the exhibit exchanged
24 before trial --

25 **THE COURT:** Was the poster board marked?

PROCEEDINGS

1 **MS. HURST:** Yes, the poster board is marked. This was
2 the form in which it was previously admitted at the last trial
3 and it was described as a poster --

4 **THE COURT:** In this trial was this marked?

5 **MS. HURST:** Yes.

6 **THE COURT:** What then is this?

7 **MR. MULLEN:** This is 1028, Your Honor.

8 **THE COURT:** What is that?

9 **MS. HURST:** This is 1028.

10 **THE COURT:** Dawn, you are the clerk. Tell us which
11 one was officially marked as an exhibit.

12 **THE CLERK:** Since I was not here that day, I will have
13 to go back through the record to see myself what happened. I
14 don't know which one she marked then, if it was the poster
15 board.

16 **MR. MULLEN:** I believe the version signed by the clerk
17 is the small 1028, although I don't have that.

18 **MS. HURST:** Your Honor, the transcript describes it as
19 a poster and the witness describes it as a poster and it was
20 this that was being displayed before the jury.

21 **THE COURT:** I remember that was displayed. It could
22 have been for illustrative purposes. I don't remember well
23 enough whether we marked a small version or not.

24 **THE CLERK:** The small version is signed. It could be
25 that's what she retrieved from the exhibit box.

PROCEEDINGS

1 **THE COURT:** The clerk has marked as 1028 the -- is
2 this Angie?

3 **THE CLERK:** It is. So she would have retrieved it.

4 **THE COURT:** -- the small version.

5 **MR. MULLEN:** Your Honor, if I could say, we don't
6 necessarily have an objection to the larger version going into
7 the jury room so long as our larger version of 43.1 also goes
8 into the jury room. That is the exhibit of the Android stack
9 that the jurors have seen blown up on the screen.

10 **THE COURT:** Do you have any trouble with that?

11 **MS. HURST:** Yes. Here is what is going on. 43.1 is
12 part of the documentation that came with the Cupcake release of
13 source code of Android. It was normal documentation in a
14 regular, you know, computer screen size. It was never created
15 in that size, and that is solely for demonstrative purposes.

16 However, both Dr. Reinhold and Dr. Bloch and Dr. Astrachan
17 all testified that this document in its original form was in
18 poster size. So what they're trying to do is tit for tat, 1028
19 for 43.1, when this, in its original form, was a poster and
20 that has only ever been a demonstrative. And it's not
21 appropriate, Your Honor, for 43.1 to be sitting in the jury
22 room making an argument.

23 This was admitted into evidence as a poster because that
24 is what it was in its original form and it was described as
25 such by three different witnesses.

PROCEEDINGS

1 **THE COURT:** The one the clerk signed into evidence was
2 the smaller version.

3 **MS. HURST:** Your Honor, all I can tell you is that was
4 a mistake. That form of that document was never displayed to
5 the jury at all.

6 **THE COURT:** Then who marked it as 1028?

7 **MS. HURST:** I can don't know. We brought this.

8 **THE COURT:** Somebody -- my clerk didn't do it. One
9 side or the other marked as Trial Exhibit 1028 the small
10 version.

11 **MR. MULLEN:** Your Honor, if I could clarify, Exhibit
12 1028, the version you are holding in your hand, was the version
13 exchanged to us before the trial. It's the version that has
14 been sitting in these banker boxes as the official trial
15 exhibit, and it's the version that was marked.

16 **MS. HURST:** Your Honor, that is incorrect. Like many
17 documents that were in native or other format, this was simply
18 marked as a placeholder in exchange to provide notice to Google
19 as to what the actual exhibit would be. Obviously we couldn't
20 send the poster board over to their offices. It was to provide
21 them notice of what was on the trial exhibit list and it was
22 never supposed to go into the boxes.

23 **THE COURT:** Didn't I say clearly before the trial
24 started that you lawyers are supposed to monitor this and that
25 the document that had the clerk's tag on it was the one that

PROCEEDINGS

1 would go into the jury room? Didn't I say that?

2 **MR. MULLEN:** Yes, Your Honor.

3 **THE COURT:** I'm going to hold off on this for a
4 moment.

5 What are your other problems?

6 **MS. HURST:** Your Honor, Exhibit 2347 was referred to
7 during the testimony of Edward Screven. Somebody passed me a
8 note at that time saying it was preadmitted, and I was mistaken
9 in that regard. There was no objection to the exhibit at the
10 time, and it was displayed to the jury, but it was not moved
11 into evidence. It's the letter to Apache that Mr. Screven
12 signed when he was at Oracle in June of 2007.

13 **THE COURT:** Is there an objection?

14 **MR. MULLEN:** No, Your Honor.

15 **THE COURT:** 2347?

16 **MS. HURST:** Yes, Your Honor.

17 **THE COURT:** That will be deemed in evidence.

18 (Trial Exhibit 2347 received in evidence)

19 **THE COURT:** What else?

20 **MS. HURST:** That's all for us.

21 **MR. MULLEN:** Your Honor, this one is easy. The
22 parties have agreed upon a joint translation sheet for exhibits
23 that were originally offered through a deposition and have now
24 been marked as trial exhibits, so what we have here is just a
25 translation sheet that can be handed to the jury. I think we

PROCEEDINGS

1 have agreement on this. It corresponds to the depo exhibit to
2 the actual trial exhibit number.

3 **MS. HURST:** We are willing to do this if the Court
4 believes it would aid the jury in tracking exhibits that were
5 shown by video, Your Honor.

6 **THE COURT:** Can I see it for a second?

7 **MR. MULLEN:** It's multiple copies of a one-page
8 document, Your Honor.

9 **THE COURT:** While we're on this general subject, this
10 just refers to depositions, but will there be a trial exhibit
11 index?

12 **MS. HURST:** Yes. We have them in both forms, as the
13 Court requested, both chronological and by exhibit number, and
14 we have it in three different versions just waiting for the
15 Court's ruling on these final issues, and we're ready to hand
16 it you up as soon as that's needed for that purpose.

17 **THE COURT:** It's been stipulated to?

18 **MS. HURST:** Yes, Your Honor.

19 **MR. MULLEN:** Yes, Your Honor.

20 **THE COURT:** So this one is called *Deposition Exhibit*
21 *Cross-Reference Chart*. You mean the -- I thought whenever we
22 read the exhibits to the -- the depositions in, we were going
23 to change the exhibit numbers.

24 **MR. MULLEN:** Yes, Your Honor. That is true for
25 deposition or trial read-ins, but for those depositions that

PROCEEDINGS

1 were played by video, it's not possible on the video obviously
2 to dub over what the witness says or the attorney in referring
3 to an exhibit, so what we've done is simply match up the depo
4 exhibit as it was referred to on the record in the videotaped
5 deposition to what the trial exhibit will actually be in
6 evidence.

7 **THE COURT:** So this is a problem only for the video
8 version, not for the read-in version?

9 **MS. HURST:** Correct.

10 **MR. MULLEN:** Correct, Your Honor.

11 **THE COURT:** So let's put into your title *for documents*
12 *admitted into evidence via video depositions.*

13 **MR. MULLEN:** Sure.

14 **THE COURT:** With that exception, this can go into the
15 jury room. It's not evidence itself of course. It's just
16 going to be sent in to the jury room as an aid, just like the
17 other indexes.

18 All right. What else do you have?

19 **MR. MULLEN:** Nothing further from our side,
20 Your Honor.

21 **MS. HURST:** Same.

22 **MR. MULLEN:** I apologize.

23 **MR. BABER:** Just very quickly and just for the sake of
24 good order, Rule 51 says we are required to state our
25 objections to the charge on the record. Both sides filed

PROCEEDINGS

1 written objections last night. I'm sure we would be happy to
2 read them, but if Your Honor deems the written versions to have
3 been made on the record, I think we've covered that.

4 **THE COURT:** Well, the time to have done it was at the
5 charging conference so both are untimely. You can take that up
6 with the Court of Appeals, but I think I've -- you can't just,
7 after I've sent out the -- unless I told you you could do it
8 that late. Did I? Maybe I did. But I don't think so. I said
9 that you could rest on your earlier objections. That was okay.
10 The objections made in that multiple rounds. But after I've
11 already sent out the final final version and taken into account
12 all of the things you've said at the charging conference, I
13 don't think it's fair to spring a bunch of new things on the
14 judge at the last minute.

15 Let's put it this way. To the extent that you need to say
16 anything on the record, it's too late now. And it was too late
17 last night. But there's no point in doing it again. If the
18 Court of Appeals forgives you for doing it as late as last
19 night, then I'm going to forgive you for not doing it again
20 this morning.

21 **MR. BABER:** That's fine, Your Honor.

22 **THE COURT:** I'm going to let Oracle use and put into
23 the jury room that big poster board because it was shown to the
24 jury. 1028 will -- this number 1028 will just be, I guess, for
25 purposes of appeal, and 1028 will go in separately as a -- as

PROCEEDINGS

1 that big poster board, but the illustrative thing will not go
2 in as a poster board because I don't think there was a mistake
3 there in the designation.

4 **MS. HURST:** Thank you, Your Honor.

5 **MR. MULLEN:** Thank you, Your Honor.

6 **MS. HURST:** We will have those lists to reflect that
7 shortly.

8 **THE COURT:** Thank you.

9 Are we ready now to begin?

10 **MR. VAN NEST:** Yes, Your Honor.

11 **MR. BICKS:** Yes, Your Honor.

12 **THE COURT:** Do we not have enough seating room back
13 there for those people standing up.

14 **MS. HURST:** Your Honor, there are people in the back
15 of the courtroom standing and people in the hallway. If there
16 could be an overflow, I think people would be very grateful.

17 **THE COURT:** I thought we did have an overflow.

18 **THE CLERK:** We do have an overflow, and I'm waiting to
19 be able to confirm that IT will be able to turn it on.

20 **THE COURT:** Where is the overflow room?

21 **THE CLERK:** Eighteenth floor, Courtroom 15. That is
22 where everybody has been going.

23 **THE COURT:** Do we have a CSO officer coming?

24 **THE CLERK:** They are going to be coming. They are
25 rearranging their coverage downstairs to accommodate us.

PROCEEDINGS

1 **THE COURT:** All right. Let's just lay out what's
2 going to happen here --

3 **THE CLERK:** The CSO is in front of the door now.

4 **THE COURT:** Could I see -- I don't think we inked in
5 the right change here. Could you bring me the change the
6 Google lawyer wanted. I had evidently made a mistake on
7 paragraph 20 and Google lawyers pointed that out and I think --
8 I intended to do what they said that I intended to do. I don't
9 think it's controversial, but I need to look at the document
10 again.

11 Anyway, what I want to do this morning, I will read about
12 10 minutes, the first one-third of the instructions. Then I
13 will call on Mr. Van Nest to give his closing. Then we will
14 have all of Mr. Bicks'. Then we will take a break, and then we
15 will have the rebuttal, and I will finish the instructions at
16 that point.

17 While the instructions are being read, please, in the
18 gallery, no getting up and leaving. You would lose your seat
19 anyway, but it is the most boring part of the trial, maybe for
20 the gallery, but for the jury it is extremely important. So if
21 I -- you just cannot move. So you have to suffer along with
22 everyone else while the instructions are being read.

23 All right. You want to say the point of contention is
24 over the declaring lines of code within the 37 API packages,
25 also referred to as declarations or header lines, which Google

PROCEEDINGS

1 concededly used in Android. Okay. I am going to phrase it
2 that way.

3 Are both sides ready to go?

4 **MR. VAN NEST:** Yes, Your Honor.

5 **THE COURT:** You have swapped out your exhibits that
6 you are going to be using and everyone is aware and there are
7 no further objections?

8 **MR. VAN NEST:** We have agreed not to exchange the
9 graphics. So that's the way we have elected to proceed.

10 **THE COURT:** So you mean it's trial by ambush and then
11 there will be objections made as we go along?

12 **MR. VAN NEST:** Hopefully not.

13 **THE COURT:** I don't like objections in closing
14 argument. But if it's critical, I will -- you should of course
15 jump up. But try not to just disturb the other side's argument
16 with objections. I wish you had all exchanged them. I thought
17 you were going to do that.

18 **MR. BICKS:** We agreed not to, Your Honor.

19 **THE COURT:** I hope you agree not to object during the
20 closing arguments.

21 **MR. VAN NEST:** That's fine with us, Your Honor.

22 **THE COURT:** Let's bring in the jury, please.

23 (Proceedings were heard in the presence of the jury:)

24 **THE COURT:** I hope you all had a great, long, restful
25 weekend. Did you? Yes. Good. Got your notepads ready?

PROCEEDINGS

1 Let's go over what's going to happen today.

2 You know the evidence is closed. So we will have the
3 closing arguments and instructions of law and I think that will
4 take us almost up to noontime. So not quite, but you need --
5 this is not going to go by fast. We've heard a lot of
6 evidence, and it will be good to hear good, long closing
7 arguments by both sides to see what they think has or has not
8 been proven.

9 And we have excellent lawyers here to give us excellent
10 closing summations.

11 Now, I need to remind you of something very important that
12 I said earlier. Despite the fact that these lawyers are
13 world-class lawyers, not one word they say is evidence. Please
14 remember that. Not a single word they say is evidence.

15 What they say is very important nevertheless because it
16 gives you a guide to what they think has been proven or not
17 proven, but you always have to do a double check and ask
18 yourself is this the way the evidence really came in. Or was
19 there some -- yes, it did come in that way, but wasn't there
20 some other important qualification. Or was there a limited
21 purpose for that evidence. And you need to be the one who did
22 that double check in your own mind on both sides to keep the
23 lawyers totally honest. Of course they are honest lawyers. I
24 don't mean they're not, but what I mean is that they are good
25 advocates, but nevertheless, what they say is not evidence and

JURY INSTRUCTIONS

1 you are the judge of the evidence. This is very important.

2 All right. The way we will proceed is I have instructions
3 that -- I'm not going to give all of them now, but I'm going to
4 give the first third of the instructions to you, and this
5 concerns the evidentiary part of the case. And then we will go
6 immediately into the closing arguments. All right.

7 So bear with me now. I'm going to read this, but this
8 is -- we all went to law school for three years. You get to go
9 to law school for 45 minutes. This is your instructions on the
10 law, but we've worked very hard -- this 45 minutes tells you
11 what you need to know about the law in order to decide this
12 case.

13 So a lot of time has gone into these instructions. There
14 will be a copy for you in the jury room, but, nevertheless,
15 I'll read about the first 10 minutes, and then we will break on
16 the instructions and go to the closings. Okay.

JURY INSTRUCTIONS

17
18 **THE COURT:** "Members of the jury, it is now my duty to
19 instruct you on the law that applies to the issue of fair use.
20 A copy of these instructions will be available in the jury room
21 for you to consult as necessary. It is your duty to determine
22 the facts from all the evidence in the case. To those facts
23 you will apply the law as I give it to you. You must follow
24 the law as I give it to you whether you agree with it or not.
25 You must not be influenced by any personal likes or dislikes,

JURY INSTRUCTIONS

1 opinions, prejudices or sympathy. That means that you must
2 decide the case solely on the evidence before you. You will
3 recall that you took an oath promising to do so at the
4 beginning of the case.

5 "In following my instructions, you must follow all of them
6 and not single out some and ignore others. They are all
7 equally important. You must not read into these instructions
8 or into anything the Court may have said or done as suggesting
9 what verdict you should return. That is a matter entirely up
10 to you.

11 "The evidence from which you are to decide what the facts
12 are consists of, one, the sworn testimony of witnesses on both
13 direct and cross-examination, regardless of who called the
14 witness; two, the exhibits which have been received into
15 evidence; three, the sworn testimony of witnesses in
16 depositions and other proceedings read into evidence; any facts
17 to which the lawyers have stipulated. You must treat any
18 stipulated facts as having been conclusively proved. Answers
19 to interrogatories and requests for admissions read to you
20 during the trial. And any facts that I have instructed you
21 must be treated as having been established.

22 "Evidence may be direct or circumstantial. Direct
23 evidence is direct proof of a fact such as testimony by a
24 witness about what that witness personally saw or heard or did.
25 Circumstantial evidence is proof of one or more facts from

JURY INSTRUCTIONS

1 which you could find another fact. By way of example, if you
2 wake up in the morning and see that the sidewalk is wet, you
3 may infer from that fact that it rained during the night.
4 However, other evidence, such as a turned-on garden hose, may
5 explain the presence of water on the sidewalk. Therefore,
6 before you decide that a fact has been proved by circumstantial
7 evidence, you must consider all of the evidence in light of
8 reason, experience and common sense.

9 "You should consider both kinds of evidence. The law
10 makes no distinction between the weight to be given to either
11 direct or circumstantial evidence. It is for you, the jury, to
12 decide how much weight to give any evidence. You should base
13 your decision on all of the evidence regardless of which side
14 presented it.

15 "In reaching your verdict, you may consider only the types
16 of evidence I have described. Certain things are not evidence
17 and you may not consider them in deciding what the facts are.
18 I will list them for you. These are things that are not
19 evidence.

20 "Arguments and statements by lawyers are not evidence.
21 The lawyers are not witnesses. What they have said in their
22 opening statements, closing arguments, and at other times is
23 intended to help you interpret the evidence, but it is not
24 evidence itself. If the evidence, as you remember, it differs
25 from the way the lawyers have stated it, your memory of it

JURY INSTRUCTIONS

1 controls.

2 "A suggestion in a question by counsel or the Court is not
3 evidence unless of course it is adopted by the answer. A
4 question by itself is not evidence. Consider it only to the
5 extent it was adopted by the answer.

6 "Objections by lawyers are not evidence. Lawyers have a
7 duty to their clients to consider objecting when they believe a
8 question is improper under the Rules of Evidence. You should
9 not be influenced by any question, objection, or the Court's
10 ruling on it.

11 "Testimony or exhibits that have been excluded or stricken
12 or that you have been instructed to disregard are not evidence
13 and must not be considered. In addition, some testimony and
14 exhibits have been received only for a limited purpose. Where
15 I have given a limiting instruction, you must follow it.

16 "Anything you may have seen or heard when the Court was
17 not in session is not evidence. You are to decide the case
18 solely on the evidence received here in the courtroom at trial.

19 "The weight of the evidence as to a fact did not
20 necessarily depend on the number of witnesses who testified nor
21 did it depend on which side called witnesses or produced
22 evidence. You should base your decision on all the evidence,
23 regardless of which side presented it.

24 "You are not required to decide any issue according to the
25 testimony of a number of witnesses which does not convince you

JURY INSTRUCTIONS

1 as against the testimony of a smaller number or other evidence,
2 which is more convincing to you. The testimony of one witness
3 worthy of belief is sufficient to prove any fact. This does
4 not mean you are free to disregard the testimony of any witness
5 merely from caprice or prejudice or from a desire to favor
6 either side. It does mean that you must not decide anything by
7 simply counting the number of witnesses who have testified on
8 the opposing sides. The test is not the number of witnesses
9 but the convincing force of the evidence.

10 "A witness may be discredited or impeached by
11 contradictory evidence or by evidence that at some other time
12 the witness has said or done something or failed to say or do
13 something that is inconsistent with the witness' present
14 testimony. If you believe that any witness has been impeached
15 and thus discredited, you may give the testimony of that
16 witness such credibility, if any, you think it deserves.

17 "Discrepancies in a witness' testimony or between a
18 witness' testimony and that of other witnesses do not
19 necessarily mean that such witness should be discredited.
20 Inability to recall and innocent recollections are common. Two
21 persons witnessing an incident or transaction will sometimes
22 see or hear it differently. Whether a discrepancy pertains to
23 an important matter or only to something trivial should be
24 considered by you.

25 "However, a witness you think is willfully false in one

JURY INSTRUCTIONS

1 part of his or her testimony is to be distrusted in others.

2 You may reject the entire testimony of a witness who willfully
3 has testified falsely on a material point unless, from all the
4 evidence, you believe that the probability of truth favors his
5 or her testimony in other particulars.

6 "In determining what inferences to draw from evidence, you
7 may consider, among other things, a parties' failure to explain
8 or deny such evidence. You may have heard from a witness in
9 our trial that there was a prior trial in this case. It is
10 true that there was a prior trial. We have heard evidence in
11 this trial of a prior proceeding, which is the earlier trial
12 that occurred in this case. Do not speculate about what
13 happened in the prior trial. No determination on fair use was
14 made one way or the other in that trial. It is up to you, the
15 jury, to determine fair use based on the evidence you have
16 heard in this trial and my instructions on the law.

17 "In this case, members of the jury, you have heard from
18 two types of witnesses. First you have heard fact witnesses.
19 These are people who were part of the story on trial and have
20 testified to the facts they experienced firsthand.

21 "Second, you have heard expert witnesses. Unlike fact
22 witnesses who were part of the story on trial, the various
23 expert witnesses have been retained by both sides after the
24 fact to testify to opinions based upon their specialized
25 training or experience. To take an example from a more routine

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1 case, in a traffic case, a fact witness is someone who saw or
2 heard the accident or was part of it, whereas an expert witness
3 is someone like an accident reconstruction specialist who
4 offers an opinion on the car's speed based on skid marks.

5 "In deciding the facts in this case, you may have to
6 decide which testimony to believe and which testimony not to
7 believe. You may believe everything a witness says or part of
8 it or none of it. In considering the testimony of each
9 witness, you may take into account the opportunity and ability
10 of the witness to see, hear, or know the things testified to;
11 the quality of the memory of the witness; the pattern of the
12 witness while testifying; the interest of the witness in the
13 outcome of the case and any bias or prejudice; whether other
14 evidence contradicted the testimony of the witness; the
15 reasonableness of the witness' testimony in light of the
16 evidence; and any other factors that bear on believability.

17 "Now, with respect to expert witnesses, the main reason we
18 allow their testimony is because they have specialized training
19 and experience with insights that may help the jury understand
20 a field of specialized knowledge and how it applies to the case
21 at hand. Usually these witnesses are paid by their respective
22 sides in litigation.

23 "Two important caveats for experts are as follows: No
24 expert witness should ever vouch for which side's fact scenario
25 is correct. No retained expert was present at the events in

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1 question. None has firsthand knowledge. Experts may rely on
2 particular documents and testimony and may make an assumption
3 that the document or testimony is correct and then give an
4 opinion based on that assumption. But the opinion is only as
5 good as the factual assumption, and the foundational fact
6 question is always for you -- and that foundational fact
7 question is always for you, the jury, to resolve, not for the
8 experts.

9 "Put differently, experts should not invade the province
10 of the jury by purporting to tell the jury which side's fact
11 version is true. Similarly, no expert witness should attempt
12 to tell the jury what someone had in mind or was thinking. The
13 mental state and intent of the characters in our story on trial
14 is for you to decide, not for the experts to decide. It is,
15 however, permissible for experts to quote testimony or
16 documents and then to assume that their statements therein were
17 accurate and then base thereon to apply their expertise to
18 render an opinion.

19 "With this in mind, I will now suggest to you some further
20 inquiries for your evaluation of the testimony of experts.
21 First, to what extent, if at all, has the expert witness
22 overstepped his or her role and tried to usurp the function of
23 the jury by vouching for the truth of one side's witnesses
24 versus the other or by giving opinions on the mental state of
25 the characters involved in the case.

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1 "Two, to what extent is the expert witness' opinion
2 actually anchored in his or her specialized knowledge and
3 training as opposed to just partisan argument, which you are
4 just as qualified to make and reject as him or her.

5 "Three, to what extent is the expert witness' opinion
6 supported by facts you find have been independently proven.

7 "Four, to what extent is the opinion contradicted by the
8 facts.

9 "Five, to what extent has the expert witness relied upon a
10 source of factual information that is biased.

11 "Six, to what extent has the expert witness cherry-picked
12 the factual record to highlight material helpful to his or her
13 opinion while downplaying the facts that undercut his opinion.

14 "Seven, to what extent has the expert witness forthrightly
15 conceded points versus stubbornly refused to concede a point
16 you think he or she should.

17 "Eight, to what extent has the expert witness been
18 influenced by money compensation paid by the side presenting
19 him or her.

20 "These are merely considerations. It is always up to you,
21 the jury, to decide how much weight to give, if any, to any
22 testimony or evidence, including from expert witnesses.

23 "Under the law, a corporation is considered to be a
24 person. It can only act through its employees, agents or
25 directors or officers. Therefore, a corporation is responsible

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1 for the acts of its employees, agents, directors, or officers
2 performed within the scope of authority.

3 "You have heard testimony that Oracle Corporation bought
4 Sun Microsystems, Inc., in 2010 and changed the name of the
5 corporation from Sun Microsystems, Inc., to Oracle America,
6 Inc. This means that Sun and Oracle America, the plaintiff in
7 this case, are the same legal entity.

8 "In these instructions, I will often refer to a party's
9 burden of proof. Let me explain what that means. When a party
10 has a burden of proof on any claim by a preponderance of the
11 evidence -- I'm going to repeat that. That's a very important
12 phrase you will hear a lot. *Preponderance of the evidence.*

13 "When a party has the burden of proof on any claim by a
14 preponderance of the evidence, it means that you must be
15 persuaded by the evidence that the claim is probably more true
16 than not true. To put it differently, if you were to put the
17 evidence favoring a plaintiff and the evidence favoring a
18 defendant on opposite sides of the scale, the party with the
19 burden of proof on the issue would have to make the scale tip
20 somewhat toward its side. If the party fails to meet this
21 burden, then the party with the burden of proof loses on that
22 issue. *Preponderance of the evidence* basically means more
23 likely than not.

24 "If you find that Google carried its burden of proof as to
25 fair use, your verdict should be for Google. If you find that

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1 Google did not carry its burden of proof, your verdict should
2 be for Oracle.

3 "I will now remind you of some important established facts
4 regarding the copyrighted works at issue in this case.

5 "The Java platform is a software application platform that
6 is used to write and to run programs in the Java programming
7 language. The Java programming language is free and available
8 to use without permission from anyone. The Java platform
9 includes, among other things, the Java virtual machine and the
10 Java API packages.

11 "API stands for *application programming interface*. What
12 is at issue in this case are the Java API packages which are
13 sets of pre-written computer programs used to perform common
14 computer functions without a programmer needing to write code
15 from scratch. These pre-written computer programs assist
16 developers in writing applications. These pre-written programs
17 are organized into packages, classes, and methods. Packages,
18 classes and methods.

19 "An API package is a collection of classes. Each class
20 contains methods and other elements. The packages, classes,
21 and methods are defined by declaring code."

22 I'll repeat that sentence.

23 "The packages, classes and methods are defined by
24 declaring code. The declaring code is the line or lines of
25 source code that introduce, name and specify the package,

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1 class, or method. The declaring code allows programmers to
2 understand and make use of the pre-written programs in the API
3 packages to write their own programs.

4 "The declaring code for packages, classes, and methods
5 reflects the structure, sequence, and organization, or SSO, for
6 the Java API packages. The SSO -- that's structure, sequence
7 and organization -- specifics the relationships between and
8 among the elements of the Java API packages and also organizes
9 the classes, methods, and other elements in the package.

10 "The term structure, sequence and organization is a
11 concept used by lawyers and courts in connection with
12 copyright. It is not a term used by computer scientists.

13 "Each individual method performs a specific function. The
14 declaring code for a method is sometimes referred to as the
15 method declaration, header, or signature. The declaring code
16 for a method tells the programmer that the information" -- I'm
17 sorry. I'll start over.

18 "The declaring code for a method tells the programmer the
19 information the method needs; that is, the inputs to perform
20 the desired functions.

21 "Each method" -- actually, it should say *desired function*.
22 So I'll read that sentence again.

23 "The declaring code for a method tells the programmer the
24 information the method needs, that is, the inputs, to perform
25 the desired function.

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1 "Each method also contains implementing code. The
2 implementing code provides step-by-step instructions that tell
3 the computer how to perform the function specified by the
4 declaring code. The declaring code and the SSO of the 37 Java
5 API packages at issue are protected as part of the overall work
6 protected by copyrights owned by Oracle. The copyright
7 protection does not extend to the idea of organizing functions
8 into packages, classes, and methods, but the copyright
9 protection does cover the SSO as expressed in the 37 Java API
10 packages.

11 "Sun developed the Java programming language and made it
12 free for all to use. Sun further developed the copyrighted
13 Java API library of pre-written code, including implementing
14 code, to carry out more advanced functions and made it
15 available for all to use with a license, although the question
16 for you to decide is the extent to which, if at all, the
17 declaring code and SSO may be copied without a license under
18 the statutory right of fair use.

19 "Anyone using the Java programming language may write
20 their own library of pre-written programs to carry out various
21 common functions. They may even write their own library to
22 cover the same functions as covered by the copyrighted works.
23 This is because copyright protects a particular set of words or
24 expression, but it does not and cannot cover ideas or
25 functions. However, even in writing their own programs to

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1 carry out the same functions, Java programmers may not begin
2 their methods, classes, or packages with the identical line or
3 lines of declaring code as used in the copyrighted works unless
4 such use of the declaring lines constitutes a fair use, nor may
5 they organize their methods into the same packages and classes
6 as the copyrighted works unless to do so qualifies as fair
7 use."

8 Now I'm going to pause there because I've gotten up to the
9 part of the instructions which will deal with the specifics of
10 the law, the four statutory factors that I read to you at the
11 outset of the trial. And we will pick up the instructions in a
12 few hours at the close of all of the closing arguments.

13 Now, remember that in this case, the burden of proof on
14 this issue lies with Google, and because of that, Google gets
15 to make the closing argument first, and then we hear from
16 Oracle and then Google gets a rebuttal.

17 So you will actually hear from the Google side twice,
18 opening and closing, with Oracle in the middle. However, both
19 sides have the same amount of overall time, so the time will be
20 the same amount of argument time.

21 So over there in the jury box, you're all set with full
22 attention and ready to go. It looks like they are.

23 Mr. Van Nest, on behalf of Google will make the closing
24 argument.

25 **MR. VAN NEST:** Thank you, Your Honor.

CLOSING ARGUMENT / VAN NEST**CLOSING ARGUMENT**

MR. VAN NEST: And good morning, ladies and gentlemen.

I want to begin by thanking you again for your service as jurors. As Judge Alsup has noted a couple of times, we understand and know how hard you're working and we really do appreciate it.

This is a very important case, not only for Google, but for innovation and technology in general, and it's been a real privilege for me and my team to have represented Google during the course of our trial.

So you notice by now that this case is about fairness and fair use. And you now heard from all the key players in this story. You heard from Eric Schmidt, our first witness, who was the chief technology officer at Sun when the Java language was introduced. He was also the CEO of Google when Android was first launched.

Our second witness was Jonathan Schwartz. He's an important player, too, he was the chief executive officer of Sun when Android came out. He was a long-time Sun employee before that.

You heard from Andy Rubin. Mr. Rubin led the Android design team at Google and got the product launched and on the market.

And you heard on Thursday from Larry Page, Google's founder, who was also a big proponent of Android.

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1 I think it's fair to say the testimony of these folks was
2 very clear and very consistent and now is largely unchallenged
3 by Oracle. What they told you was that the Java programming
4 language has been open and free from the very beginning,
5 available for anyone to use without permission. And in
6 addition to that, the Java API declarations that are at issue
7 in this lawsuit have always been treated by Sun as open and
8 free and given away, along with the language, making those Java
9 API declarations available to everybody. It was part of Sun's
10 business plan to make the language extremely popular and build
11 a big base of customers for Sun's products. So as are part of
12 that plan, Sun permitted third parties like GNU Classpath and
13 Apache Harmony, to build their own separate implementations
14 using the same API declarations that Google used in Android.

15 So what the Google engineers did was nothing out of that
16 mainstream. They built Android from scratch using new Google
17 technology and adapted technology from open sources. They also
18 used a very small portion of Java SE, these free API
19 declarations which everybody at that time assumed and
20 understood were free to use, they matched them with new
21 implementing code written by Google or adapted from open
22 source, and they integrated that into this great big platform
23 that we call Android.

24 And Android was a remarkable thing. It was a brand new
25 and different platform for innovation, and most importantly, it

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1 was a brand new use for the Java declarations which had never
2 been used in this way before. Never. And a use which no other
3 company before or since has been able to achieve.

4 So when Android was launched, Sun didn't object. Sun
5 didn't complain. Sun's chief executive officer said publicly
6 on a Sun website, "Congratulations, Google. Android, welcome
7 to the Java community. We support your effort. We support
8 your effort." And "Thank you. Android has put a set of
9 rockets onto Java." That was Mr. Schwartz.

10 Mr. Schwartz further testified that he never objected to
11 the way in which Google was using the Java API declarations.
12 He thought it was fair. It was consistent with Sun's business
13 practices at the time. And the evidence backs that up and I'm
14 going to walk you through the evidence step by step here in
15 just a minute, but the evidence was not only Mr. Schwartz, but
16 everybody else at Sun supported Android. They offered support.
17 They expressed their appreciation and they developed their own
18 product to work on top of Androids. No better endorsement than
19 that.

20 Not once, ever, did anyone from Sun tell anyone from
21 Google, *hey, you need a license to use these API declarations.*
22 That simply never happened.

23 Even Mr. Ellison said he was excited and flattered by
24 Android's use. You saw the video and you will see it again
25 this morning, but he stood up at a JavaOne conference and told

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1 everybody, "Hey, I love the way Sun has given Java away and I
2 am excited and flattered by the way Google is using Java in
3 Android." That's what he said.

4 It wasn't until later, it wasn't until later, that
5 Mr. Ellison changed his mind. It was after he had tried to use
6 Java to build his own smartphone and failed to do it. After he
7 had tried to sell Sun technology to Google to use in Android.
8 That failed, too. Then and only then was this claim made.

9 And so now we're in the situation where Oracle, which had
10 no investment in Android, took none of the risk, they now want
11 all the credit and a whole lot of money. And that's not fair.
12 Because the evidence you've heard, which I'm going to review in
13 detail, establishes that not only was Google's use of these
14 open API declarations a fair use, but it was consistent with
15 Sun's policy. It was applauded by Sun executives. It was a
16 benefit to Java and Java developers and it has caused no harm
17 whatsoever to the copyrighted works. It's helped Java. It
18 hasn't hurt Java.

19 So let's put up a very important slide. You're going to
20 hear from Judge Alsup when we finish more about the jury
21 instructions. This one is very important. I expect he will
22 read this one to you. This case is about fair use and fair use
23 involves the right to use copyrighted works without the
24 copyright owner's consent. That's important. It's not about
25 licenses, because if a use is fair, no permission from the

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1 copyright owner is necessary. No license is necessary. Why?
2 Because the policy behind the right of fair use is to encourage
3 and allow the development of new ideas that build on earlier
4 ideas. That's innovations. Building on old ideas to create
5 something new and different.

6 So as this next slide shows, transformative use is one of
7 the hallmarks, one of the hallmarks of fair use. Why? Because
8 just copying something like a bootleg CD, that's not fair use.
9 But if you use a small amount of a copyrighted work to build
10 something completely different and new that is transformative,
11 that's what fair use is all about. And as this slide
12 indicates, this is one of the tests for transformative use.
13 Does it add something new with a further purpose or different
14 character that alters what was used from the copyrighted work
15 with a new expression.

16 Android is exactly the kind of thing that the Fair Use
17 Doctrine was intended to protect. Because Google engineers
18 used a very tiny portion. They used less than one-half of one
19 percent of all the code in Java SE. And they used what they
20 understood and everyone understood were the free and open
21 declarations, and they built a brand new system around that
22 with new implementing code, more technology, a new virtual
23 machine, an operating system, the whole shebang. And so it was
24 not only a brand new platform for people to innovate on, but it
25 was a new way of using the Java declarations.

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1 Now, Judge Alsup will also outline a number of factors for
2 you to take into account in determining fair use. I'm going to
3 go through those, too, and talk about the evidence on them.
4 But it's really important to note that those factors are not
5 exclusive. Those factors are not exclusive. Fair use is a
6 doctrine to promote innovation and change and so you can take
7 into account any other factor that you think relates to the
8 purposes of fair use, one of which is certainly to promote
9 innovation and change, just like Android.

10 So let's look at the key points of evidence, and we'll
11 start walking through the evidence with you step by step. All
12 of the factors and the evidence that we're going to see support
13 a finding of fair use. All of them. Every single one. And
14 I'm going to go through them one at a time. But these are the
15 points that we'll make and the order we'll make them.

16 One is that Sun Oracle made the Java API declarations free
17 and open along with the Java language. That was true from the
18 very start of Java.

19 Android is highly transformative. I've said that and
20 we'll prove it with the evidence.

21 The declarations are both purely functional, that's
22 important, and a tiny fraction of Java SE. That's this concept
23 of if you copy the whole thing, like a bootleg CD, that's not
24 fair use, but if what you are using is a very small portion and
25 if what you're using is functional or has a functional purpose?

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1 That supports fair use.

2 Finally, Android's use of the API declarations did not
3 harm Java. Another factor you will be asked to consider is has
4 Android harmed Java. We had a lot of discussion about that
5 with Dr. Jaffe and you now know that Android hasn't -- is not a
6 substitute for Java. It's a brand new category, a brand new
7 thing. It's not like Java SE. It's not like Java ME. It's a
8 category all unto itself, and we will review the evidence on
9 that.

10 Here is our four key players: Mr. Schmidt, Mr. Schwartz,
11 Mr. Rubin, Mr. Page. And I would suggest they are -- you've
12 heard them from the stand. You have a chance to evaluate their
13 testimony. But it was all largely consistent and unchallenged
14 by Oracle.

15 So principle one, Sun developed the Java programming
16 language and made it free for all to use. Judge Alsup just
17 read you that during the instructions. That's an established
18 fact in the case. No debate about it whatsoever. And now that
19 you've heard the testimony, the evidence is also undisputed
20 that the API declarations that we're talking about in this case
21 were promoted by Sun as free and open, along with the language.
22 This is the testimony you heard from Mr. Schwartz on the second
23 morning of trial. I asked him, "Were the APIs marketed by Sun
24 along with the language; in other words, free and open?"

25 "Absolutely, yes?"

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1 We asked him again, "Were the APIs made free and open like
2 the language at that time?

3 "Absolutely yes."

4 Remember, he said we promoted this all over the world,
5 high schools, universities, conferences. We put it out there
6 to make the language more popular. That's what we did.

7 Next one, Mr. Schwartz, "During your tenure at Sun" --
8 this is all testimony that you heard -- "all the way up to the
9 very end" -- let me pause there. His tenure at Sun was 13
10 years. He started in '97 and worked his way up. He was Chief
11 Strategy Officer, Chief Operating Officer. Then he was Chief
12 Executive Officer.

13 "Was there ever a time, ever a time where the Java APIs
14 were considered proprietary to Sun?

15 "No. Never."

16 Remember, he talked about open APIs. And I asked him,
17 "Tell the jury what open APIs meant at that time.

18 "So the strategy -- the strategy, which had been the
19 strategy long before I joined Sun, was we agree on APIs, on
20 these open APIs. We share them. We share them. And then we
21 compete on implementations.

22 "What does that mean?

23 "It means that the interfaces, the interfaces, the APIs,
24 they're shared, they're free, they're open. You can use them.
25 And what you build with them is proprietary. What you build

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1 with them is proprietary."

2 Now, we have heard a lot of different testimony about
3 APIs, and you will remember my file cabinet, the point of which
4 was to say that the APIs are just a method of organization.
5 The cabinet is a package, the drawers are like the classes, and
6 in the drawers are the methods.

7 But a couple of the witnesses offered their own version of
8 the file cabinet, so Mr. Schmidt talked about an electrical
9 wall outlet and plug, and his point was the API, the interface,
10 is the plug and the outlet and everybody uses the same one so
11 we don't have 30 different outlets in our homes or 30 different
12 plugs on appliances. What you build behind the wall, that's
13 your proprietary technology. Just like what Sun built in its
14 implementing code was their proprietary property, but here, you
15 might use sun power, you might use wind power, you might use
16 electrical power. You compete on those, but the interface is
17 open and free, which is what Sun chose to do with their
18 interfaces. That was Mr. Schmidt.

19 Mr. Schwartz gave a little different one. Remember, he
20 was hamburger for breakfast. What he was saying was everybody
21 works off the same menu. If you order a hamburger, and that
22 was his example, we all have some idea what a hamburger is.
23 Everybody can use that, the same menu and the same names, but
24 we compete on the kind of hamburger you serve in your
25 restaurant. That's your proprietary -- that's your property.

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1 So the API is hamburger there. It's the menu.

2 Now, we went on and I asked Mr. Schwartz, "What about
3 these third parties that are using your APIs to build their own
4 implementations? What about them? What was the practice at
5 Sun during your tenure with respect to third parties who used
6 the APIs with their own implementations?"

7 He said, "There was nothing we could do to stop it. It
8 was completely -- it was fair. It was fair. It's what they
9 were -- they weren't asking us to put our logo on it and they
10 weren't asking us to call it Java. The idea was if you want to
11 build something with the APIs and call it Java and use the Java
12 coffee brand, the logo, and tell everybody we're compatible
13 with Java, then you have to pay Sun a fee. That was their
14 rule. If you are going to call it Java, use the brand, you've
15 got to pay. But if you want to build your own independent
16 version using the open APIs, like GNU Classpath did, like
17 Apache Harmony did, like IBM did, that's okay. That's okay."

18 That's what the policy was throughout his tenure at Sun.

19 And this is important. Judge Alsup just read this to you.
20 You may have been surprised by the way Oracle's lawyers treated
21 Mr. Schwartz. Right? They didn't challenge his testimony, but
22 they criticized him as CEO and suggested that he wasn't a very
23 good CEO. Well, Sun is Oracle America. It's the same party.
24 He was in charge of the party that's the plaintiff at the time
25 in question in this lawsuit. That is a very critical thing to

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1 understand. Sun/Oracle -- what we call Oracle America is Sun.
2 They just changed the name.

3 Now, it's not just Mr. Schwartz. You heard from other
4 folks that we brought in that were important at the time in
5 Sun. Josh Bloch wrote many of the APIs that are at issue. He
6 talked about writing APIs and what that means. And Mr. Phipps
7 was the head of open source at Sun back in the day. Their
8 testimony was absolutely consistent with what Mr. Schwartz and
9 Mr. Schmidt said.

10 We asked Mr. Bloch, "Can you explain why it was that the
11 APIs were being made public?

12 "They were being made public so people could use them. If
13 you build a tool but don't tell people, you might as well not
14 have built it."

15 Remember, he said he did everything he could to make the
16 APIs more popular and more useful. He wrote a book, wrote
17 several books, he taught lectures, he taught engineers. He was
18 trying to make the APIs as popular and as useful and as
19 widespread as he possibly could. And he even worked with GNU
20 Classpath. You recall his testimony that with the knowledge of
21 his boss, he worked with GNU, one of these independent
22 implementations, to help make their independent version as good
23 as he possibly could.

24 Now, Mr. Phipps said the same thing. And he gave us a
25 document that existed back in the day. It's TX 7722. Now,

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1 note, down in the left-hand corner I have the TX number. That
2 means *trial exhibit*. You will not have my beautiful slides
3 back in the jury room, but you will have the exhibits. So if
4 you see an exhibit that you think is important -- and I've
5 tried to pick the ones that are the most significant -- I've
6 got the number on the slide, and that will help you -- it may
7 help you find it.

8 All right. Here is Mr. Phipps in 2006 on an official Sun
9 website telling folks that Sun is working with Apache and GNU
10 and others. I mean, the question is, "Have you been engaging
11 with the non-Sun Java SE platform committees?

12 "Yes, I have. We've been in contact with these folks.
13 We're very grateful to them."

14 And who's listed there? Apache Harmony is listed, GNU
15 Classpath is listed. These folks were part of the Java
16 community. They weren't renegades or outlaws. They were
17 welcome at JavaOne, and Sun was fully aware of them. None of
18 them had licenses. GNU didn't have a license, Apache didn't
19 have a license. Sun was happy to have them.

20 And guess what? Sun made this also clear in its 10K
21 official government filings, as this next line shows. This is
22 something that was filed with the Securities and Exchange
23 Commission outlining the policies of Sun. This was created
24 back in 2008, so it's right in the relevant period we're
25 talking about, and what they told everybody -- and all the top

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1 executives signed these -- right? And what they told everybody
2 was, "With a strong commitment to open standards, open
3 interfaces and the open source community, we believe sharing
4 and collaboration is the key to our success."

5 You heard Dr. Jaffe confirm for me on Thursday open
6 interfaces, that means APIs. That's declarations. That's the
7 same thing we're talking about. This is Sun in 2008 confirming
8 for the world "we support open interfaces." That's just
9 exactly what Mr. Schwartz testified to and Mr. Schmidt, Eric
10 Schmidt, as well. It wasn't something that Mr. Schwartz
11 thought up. It was there from the beginning.

12 This is Eric Schmidt's testimony. Remember, he is now at
13 Google, but he was at Sun for 18 years and he was responsible
14 for the Java language and the APIs. He testified that he was
15 the person at Sun responsible. All right.

16 We asked him, "When Sun first released the language, were
17 the Java APIs included along with it?

18 "Yes.

19 "Why was that done?

20 "It's not possible to use a language without the
21 interfaces."

22 And that point, ladies and gentlemen, is confirmed by all
23 the witnesses, both sides. That to make effective use of the
24 language, you must use the APIs. It doesn't make sense to use
25 the Java language if you can't use the APIs, which is what

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1 Oracle's trying to tell you in this trial.

2 Here is Dr. Reinhold. He's their chief architect of Java
3 and he was involved, as you heard, in putting this whole trial
4 together. Even he admits, "Dr. Reinhold, without the APIs, the
5 Java programming language wouldn't be much use, would it?

6 "That's true."

7 He said that right from the stand during the course of our
8 trial.

9 And you heard from Donald Smith. We played his video.
10 That was testimony sworn under oath. "Do you understand the
11 Java language to include the APIs?

12 "Yes. I mean, the APIs are a critical part of the Java
13 language. Remember, the Java language is free and available
14 for anyone to use with no permission.

15 "Would you say that's true for the APIs at issue in this
16 case?" We asked him a specific question. "What about the
17 declarations from the 37 packages that we're talking about?

18 "Yes. Those APIs are a fundamental part, a fundamental
19 part of what makes Java Java -- what makes a developer
20 recognize Java."

21 He was designated as a corporate witness by Oracle. He is
22 speaking on behalf of their company.

23 And all of this was tied up by what Mr. Schwartz said in
24 this video that I'm going to play. This was long before the
25 lawsuit started back in 2006. He made clear that their basic

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1 business plan or part of it was make some of our technology
2 free and open so that we have opportunities with the rest of
3 our technology. Sun at that time, 95 percent of its revenues
4 were from hardware, servers. Servers, personal computers.
5 That's what they sold. So let's listen to Mr. Schwartz talk
6 about what the strategy was.

7 (Whereupon, the video was played for the jury)

8 **MR. VAN NEST:** "There is a rising tide that lifts all
9 the boats." That is Mr. Schwartz describing the concept at Sun
10 of giving some of their technology away for free. That's why
11 when Android was launched in '07, there wasn't a huge outcry.
12 You have heard the folks from Oracle saying, "Oh, boy, you knew
13 you needed a license, you knew you needed a license, you were
14 stealing our technology. You knew it was in your phones." If
15 that were really true, then why wasn't there a huge outcry in
16 '07 when Android became public and was posted on the website,
17 including all the APIs. This is what happened instead.

18 Mr. Schwartz, on an official public blog, said
19 "Congratulations, Google. I want to add my voice to that of
20 others in offering my congratulations on the announcement of
21 their new Java/Linux phone platform Android. Congratulations."

22 Down at the bottom, he says, "We've done a ton of work to
23 support developers on all Java-based platforms, and we want to
24 add Android to the list."

25 This is a public statement, official statement that the

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1 plaintiff made back when Android was launched.

2 And it's not just that. It's not just that. That is
3 consistent with what Schmidt said and Schwartz said had been
4 going on for Sun at years. But let's look at the other
5 exhibits that follow this. I'm going to show you this one, TX
6 3441. This is an email that same week from Mr. Schwartz to
7 Mr. Schmidt about Android. "Let us know how we can help. Let
8 us know how we can help. We want to help."

9 Now, let's put up our timeline. I've got a bunch of blue
10 exhibit numbers on there. The black ones are from this
11 timeline. This is some of the evidence you have received about
12 what went on between Google and Sun after Android launched. So
13 look at the left-hand corner, TX 207.

14 Before the launch, Mr. Schwartz offers support. At the
15 launch, 3441, he offers support. After the launch in March of
16 '08, the two met. That's in TX 3466. Mr. Schmidt didn't say
17 "you're using our technology unfairly." He said -- excuse me.
18 Mr. Schwartz didn't say, "you're using our technology
19 unfairly." He said, "I want to build something on top of
20 Android. Can I do it?" And there was an email exchange that's
21 reflected on our timeline.

22 And then in May of '08, they actually demonstrated at
23 JavaOne a new Sun device working on Android. Let's pull that
24 up. We don't have -- I'm not going to play the video again
25 because it's kind of long, but you remember there was a video

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1 of some of the sales and engineering folks at Sun demonstrating
2 what they called a brand new Sun product, Java FX. And they
3 said, "Wow, look what it's running on. Android." That's an
4 Android phone, development phone that you see there.

5 Okay. Then the story continues. There's more email
6 traffic in April of '09, Schwartz to Schmidt. "We'd love to
7 work together on Android. Love to work together." That is TX
8 7573.

9 And then Mr. Ellison gets up and praises Android. We will
10 see that in a minute.

11 Mr. Schwartz then congratulates Verizon on their first
12 Android phone. And on and on and on it goes.

13 So after all that, I asked Mr. Schwartz this question:
14 "In those conversations and emails" -- and now I'm referring to
15 the conversations and emails on that slide -- "did you ever
16 tell him" -- him is Mr. Schmidt -- "that Google needed a
17 license just to use the Java APIs and Android?"

18 "No."

19 Again, unchallenged testimony from both Mr. Schmidt and
20 Mr. Schwartz, who were the two guys talking about this at the
21 very top of their companies.

22 I asked him a second question: "Did you ever tell anyone
23 at Google that what Google was doing or about to do with the
24 Java APIs," that's the Java APIs at issue here, "was wrong?"

25 "No."

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1 Unequivocal. And nobody came in here and told you
2 otherwise. Nobody came in here and told you that somebody went
3 to Google or Mr. Schmidt or anybody and said you need a license
4 just for the open free APIs. They knew that what Google had
5 done was reimplement with its own technology something new and
6 different.

7 Here's Mr. Ellison. He also endorsed the use of Java in
8 Android. He says, just like -- just like Mr. Schwartz and
9 Mr. Schmidt testified, "Sun has done a fantastic job opening up
10 Java, giving Java to the world, and we're going to do more of
11 the same." And then what did he say specifically about
12 Android? Let's play that video which is from TX 2939.1.

13 (Whereupon, the video was played for the jury)

14 **MR. VAN NEST:** So for years after Android was
15 announced and launched and public, Sun was supporting,
16 Mr. Ellison was supporting.

17 I want to pause now to talk about these license
18 negotiations that you're going to hear a lot about when Oracle
19 gets up. You are going to see a million emails about critical
20 lines and so on. That has nothing to do, nothing to do with
21 the Java API declarations. Those discussions happened, we now
22 know, much earlier in '05 and '06. And every witness has
23 testified, including Mr. Schwartz, Mr. Rubin, Mr. Page, and
24 Mr. Schmidt -- said those were about something different.
25 Those were about getting proprietary technology from Sun and

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1 the logo and the whole kit and caboodle.

2 Can I have our next slide up, please. This is a joint
3 presentation by Sun and Google. It's TX 5317. A joint
4 presentation where both of them acknowledge what Sun was going
5 to contribute was a Java implementation, and that second line,
6 "proven experience in building word-class Java
7 implementations." That's proprietary Sun technology. And what
8 Mr. Page told you on the next slide was yes, we wanted to do
9 that early on to help facilitate our building of Android.

10 What was Google looking for in its relationship with Sun
11 at that time? I think we were, you know, intending to use
12 their technology, the implementation of Java and their
13 proprietary technology to put in Android. Would you have
14 needed a license for that? Yes, we would. And they negotiated
15 for a license. But they didn't get a deal. There was no joint
16 development agreement, and so then Google did the right thing,
17 with Sun's full knowledge. They used the open and free
18 declarations. They wrote their own implementation, their own
19 implementing code. They took open source code and used it,
20 adapted it from Apache and so on. And when 2007 rolled around
21 and they made Android public, they announced it, Sun said,
22 "Fine. Welcome. We're glad you're here."

23 Now, I want to pause for a minute and talk about the
24 factors that you're going to hear about in Judge Alsup's
25 instructions. I want to go through the evidence on each one of

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1 these as well.

2 The purpose and character of the use. What you're going
3 to hear is that there are certain factors that you should
4 consider and you can consider any other factors that you think
5 are relevant, too, but these are ones that you're going to hear
6 a little bit about. The purpose and character of the use means
7 is it just a copyright or is it transformative. Is it like a
8 bootlegged CD, or is it something where you made changes and,
9 as I've said, Android is highly transformative?

10 The nature of the copyrighted work. That means what is
11 Java, what are these declarations. Are they literary like a
12 poem or novel or are they functional like something you use?
13 Obviously they are functional.

14 The third one, the amount and substantiality of the
15 portion used. That means how much. Did you copyright the
16 whole thing? Well, Java SE is five million lines of code and,
17 you know that the only thing that was used in Android are the
18 method declarations, a very tiny fraction of Java SE.

19 The effect of the use on the market or value. That's what
20 we talked about with Dr. Jaffe. And that is has Android been a
21 substitute for Java SE. Java SE is the copyrighted work. If
22 you copy something in whole and you're just a substitute,
23 obviously it may be hard to sell the original. That didn't
24 happen here because Android is not a substitute.

25 And other factors we'll talk about are good faith and

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1 industry practice. Google engineers and managers acted in good
2 faith consistent with what they understood industry practice
3 was and Sun understood that at the time, too.

4 And this next slide just reemphasizes what I said. Those
5 factors are not exclusive and you may consider any additional
6 circumstances that promote the Copyright Act, including the
7 right of fair use, promoting the progress of science and useful
8 arts. That means innovation. Promoting the progress of
9 science and useful arts.

10 Okay. Let's talk about transformation. I showed this
11 slide a little bit earlier.

12 Let's go to the next one, please, Mr. Dahm.

13 A use is transformative if it adds something new with a
14 further purpose or different character. All right. What's
15 Java SE? What's the original copyrighted work? You know that
16 it was designed for desktops and servers, big devices. That's
17 where Java SE is and that's where it is today. It wasn't even
18 intended to be used in a smartphone. And before Android came
19 along, nobody had ever used any part of Java SE successfully in
20 a smartphone. Right?

21 You saw the SavaJe. Let's go to the next step. You saw
22 the SavaJe. This is the SavaJe. This was an attempt very
23 early on to use Java SE in a smartphone. It's not what we
24 would consider a smartphone. There is no touch screen. There
25 is no GPS. You have to punch these -- it's got a keypad. No

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1 keyboard or anything like that. But this was the first effort
2 at using Java SE, and it was a failure, as you heard everyone
3 testify.

4 There were other examples of failure, too. The one on the
5 left. Project Daneel was testified to by Mr. Gering on video
6 during our portion of the case, and the one on the right,
7 OneJava, that is something Dr. Reinhold testified to. So no
8 one had been able to make any use of Java SE in a smartphone
9 and that had nothing to do with Android. All this happened
10 pretty much before Android got out there.

11 That's what Mr. Schwartz says. "Was Sun's failure to
12 build its own Java-based smartphone platform attributable in
13 any way to the presence of Android?

14 "No."

15 SavaJe failed long before Android was even announced and
16 these other projects failed before there was any Android phone
17 of any note on the market. So Oracle, they tried, too.
18 Mr. Ellison commissioned a study. Project Java Phone. He
19 concluded very limited experience to make smart decisions.

20 Now, Oracle prides itself, and rightly so, on solving the
21 most complex computing problems there are, and yet even Oracle
22 couldn't figure out how to do this. That's further evidence
23 that this is truly a transformative thing. And what is the
24 evidence that you heard from the experts and the witnesses
25 about Android? Let's put up the stack.

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1 You heard testimony about this platform from Mr. Rubin,
2 Mr. Bornstein, Mr. Bloch, Professor Astrachan, and their
3 expert, Professor Schmidt. I want to distinguish Doug Smith
4 from Eric Schmidt. Eric Schmidt is the Chairman of Google.
5 Douglas Schmidt was there expert. Fifteen million lines of
6 code in Android. And that's 15 million above the Linux kernel.
7 And the Linux kernel is other 10 or 11 million.

8 And what is it that was said about the transformative
9 nature of this? You remember Professor Astrachan drew this
10 chart, and his testimony, which Professor Schmidt, Doug
11 Schmidt, from Oracle confirmed was "Wow, did they make some
12 changes."

13 First of all, they selected 37 API will packages out of
14 166 in Java. They didn't just try to ram Java SE into it.
15 They selected the ones they thought developers would want to
16 use in mobile. They then implemented that with new
17 implementing code. And why was that important? Because a
18 desktop has got all the power it needs and all the memory it
19 needs, but a smartphone doesn't it. It's using a battery. You
20 want it to be low battery, low power, low memory.

21 So they implemented it with code that they wrote or
22 adapted from Apache, optimized for mobile. Then they added all
23 these libraries, these green libraries which their Professor
24 Schmidt says that does the heavy lifting. This gives you your
25 graphics, your audio, your video, your media framework, your

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1 WebKit for browsing. That's all taken from open source.

2 Then because Java SE was never intended for smartphone,
3 they had to write their own Android libraries there in Android
4 Runtime, and they added 100 of those for things like an
5 accelerometer because you might want to shake your phone and
6 you will never shake your desktop, right? Or GPS which you
7 don't use on a desktop. Or a camera which you typically
8 wouldn't have on a desktop. They had to do that from scratch.
9 And then the Dalvik Virtual machine was customized to run a
10 smartphone because it runs faster, uses less power, it's
11 different and better than the Java virtual machine. And you
12 don't have to take this from Professor Astrachan. Professor
13 Schmidt confirm all this, too.

14 That's not to mention the Linux kernel, which didn't exist
15 anywhere in Java SE. They added that operating system on the
16 bottom to make the platform. The most important part of all
17 this is that none of that involved any of the proprietary
18 implementing code from Java.

19 Let's look at the next slide.

20 Remember, the only thing that's at issue is the yellow
21 method declarations that everybody understood were open and
22 free. On the left for the max function is the code from
23 Java SE. On the right is Android. They're different because
24 Android engineers, Google engineers wrote that from scratch.
25 They wrote that from scratch or adapted it.

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1 So at the end of the day, there's really virtually nothing
2 in common between Java SE and Android. Right? Android's using
3 a tiny fraction of the declarations, a lot of libraries that
4 don't exist in Java. It's using a Dalvik Virtual machine,
5 which is different from the Java Virtual machine. It's using
6 an operating system, Linux, which doesn't exist in Java at all,
7 and a hundred new libraries written by Google to work on a
8 smartphone.

9 And who was the biggest salesman of Android in the room?
10 Obviously the Google folks love Android, but so does Professor
11 Schmidt. When he is not here as a testifying expert, he is
12 teaching Android. His course is Overview of Computer Science
13 and Android. He teaches Android as a separate standalone
14 course, and there he is, holding up his Android phone. There
15 is more evidence of transformative use, too, from the Oracle
16 side.

17 This is TX 460. Mr. Barr was a longtime Sun employee.
18 The senior technologist for Java, one of them, and he says on a
19 blog, again officially hosted, "I still applaud Google for the
20 effort" -- excuse me. I will read that again. "I still
21 applaud Google for the effort. The mobile industry is in the
22 midst of a major shift and Android is an embodiment of that
23 shift." That's among the evidence you will have in the jury
24 room.

25 And what did Mr. Barr say about that? We played his

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1 testimony under oath.

2 "Do you believe that Android transformed the mobile
3 industry as well?

4 "I think I answered that before. In some ways, yes.

5 "Was Android transformative?

6 "I think I already answered that, that I believe in some
7 ways, yes."

8 Testimony under oath.

9 Even their expert, Dr. Jaffe, called Android a feat not
10 achieved by any other tech giant. He conceded this on the
11 stand on Thursday.

12 "You said it was a feat for Google to have established
13 Android as a new viable mobile application platform?

14 "Yes. And that's a feat," he says, "that many other
15 sophisticated tech companies failed to achieve. Yes."

16 He listed Facebook, Microsoft, and even Sun itself.

17 Now, an important concept here. Oracle's position in the
18 opening was well, none of this is transformative because you
19 use the declarations in the same way they were used in Java.

20 Well, number one, we didn't do that. Google didn't do
21 that. The declarations are used in a totally different context
22 in Android. They're used in the context of an open source
23 mobile platform that was innovative and new.

24 But even if that weren't true, the jury instruction that I
25 got have up there that you will hear from Judge Alsup

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1 momentarily says "to qualify as transformative, the material
2 copied need not be modified in the new work." You can use it
3 in the new work the same way it's used in the old work as long
4 as it's otherwise transformative. In other words, if you've
5 added new expression and meaning and put it in a different
6 context.

7 So the argument that somehow Android doesn't qualify
8 because the same declaration headers were used, that doesn't
9 fly as a matter of law. That doesn't fly as a matter of law.

10 You're also going to hear that Android is commercial and
11 therefore disqualified from being transformative. Well, that's
12 not true either. That's not true either. Something can be
13 both commercial and transformative. And I would suggest that,
14 yes, there are commercial uses for Android, but of course
15 Android itself is open source. Google doesn't charge any
16 money. They give the platform away.

17 But what this instruction tells you is that although
18 commercial use counts against fair use, the more transformative
19 an accused work, the more other factors such as commercialism
20 will recede in importance. In other words, if your creation is
21 highly transformative, it can also be commercial and qualify as
22 a fair use. Commercial use does not disqualify. And the
23 nature of commercial use here is not direct because, again,
24 Google makes no money selling Android. They make it open
25 source. What does that mean? It's a platform for benefit for

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1 everybody. Developers can use it, OEMs, handset manufacturers
2 can use it, carriers can develop phones using it. It gives
3 consumers an enormous range of choices, which we see here on
4 all these phones and tablets.

5 So it's a platform for innovation for many, many people
6 which counts in favor of fair use. And Google competes on
7 Android like everybody else. Oracle could build a product to
8 use with Android. Sun attempted to build products to use with
9 Android. It's open. Anybody can use it. You don't need
10 Google's permission or anything like that. Okay. Android is a
11 highly transformative use of the API declarations.

12 This next point we'll cover quickly. "The API
13 declarations are both purely functional and a tiny fraction of
14 Java SE." So we're asking two questions here. The first one
15 is how much of the copyrighted work was used. And what was the
16 context of the copyrighted work. Is it a play? Is it a novel?
17 Let's look at the next slide and we'll make this clear.

18 "The second statutory factor is the nature of the
19 copyrighted work. This factor recognizes that traditional
20 literary works are closer." That means closer to protection of
21 copyright than informational. In other words, if you write a
22 novel or a play or a movie, that's sort of at the heart of what
23 copyright is intended to protect. If you writing something
24 functional like computer code or declarations, that's not so
25 close. Why is that?

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1 What the Copyright Act is attempting to protect is the
2 items that in the end their finished work are creative as
3 opposed to functional. That's really what this is all about.

4 Now, it may be true that it's hard to design an API.
5 Maybe it's a creative process to design. That doesn't matter.
6 It's a creative process to design a good instructional manual
7 too, as we all know.

8 The idea is what is the finished work? Is it a literary
9 work or is it a functional work? The more functional it is,
10 the more this use favors fair use. Well, we know what these
11 declarations are. They are functional. This next slide tells
12 you and you saw this with Professor Astrachan. The words used,
13 `java.net` means networking; `java.io` means input/output;
14 `java.security` means exactly what it says; `java.util`. And so
15 are all the method names, too. These are class and method
16 names on the right. `GetDateAndTime`. Do we wonder what that
17 means? `GetDateAndTime`. Many of the APIs at issue are of that
18 nature. They're *get* or *set*. What do you think `setDateAndTime`
19 means or `ConnectEvent`? These are all descriptive words. They
20 are functional.

21 That's why I say as in the file cabinet example, if a
22 developer wants to do a function that involves math, he or she
23 knows to go to the `java.lang` package, go to the `math` class, and
24 open up the `math` class and pull out the method, and, again, the
25 only thing that is used in Android from Java is this method

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1 declaration, this title, the declaration itself, all the code,
2 and that's what the developer ultimately wants to access, all
3 the code written by Google or taken from open source. Not used
4 from Java.

5 The point is this is a system and a method of
6 organization. It's not a novel. It's not a play. It's not a
7 poem. And that is crystal, crystal clear.

8 The third factor, how much? Did you copy the whole thing?
9 Did you use the whole thing? Well, we know that's not true.
10 This is the third factor. How much of the overall copyrighted
11 work was used?

12 So what's the overall copyrighted work here? Java SE.
13 Java SE is a great big platform. Five million lines of code.
14 These are approximate numbers. It's not exactly 5 million,
15 just like the declarations aren't exactly 11,500. But if you
16 look at this, the big pie, that's Java SE.

17 The little sliver, that's the lines of code. That's the
18 open and free method declarations that Google engineers and
19 everyone else understood were free to use. And guess what?
20 Those labels aren't any more important than anything else.

21 Professor Schmidt tried to sell you on a build test. He
22 talked about a build test. Well, he messed up the build test.
23 He said, "I took out some of the APIs and Android wouldn't
24 work." Well, all he did was take out some of the Java APIs.
25 You have to have a control when you do an experiment like that.

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1 What happens if you take out the Android ones that no one is
2 complaining about?

3 Guess what, Professor Astrachan did that. He said you
4 can't do an experiment like that without control. So he went
5 and he took some Android packages and took them, and it
6 wouldn't work either. And that's totally logical.

7 Because Mr. Bornstein and Professor Astrachan, and
8 Professor Schmidt, Doug Schmidt, they all confirmed this is one
9 big thing, Android. It's one big unified cohesive thing, and
10 if you take any part of it out, it won't work. So that build
11 test is meaningless.

12 And you know from common sense, it can't possibly be true
13 that these Java API declarations are critical to building a
14 smartphone. Right? Because you know that some of them were
15 used in SavaJe, which was a total failure. And you know --
16 those of you that have iPhones, iPhones are very successful.
17 They don't use any Java at all. iPhones are written in a
18 different language entirely. They're written in Objective-C.

19 So all of these lines are the same. Here's Mr.--
20 Dr. Reinhold confirming this for us, that there's nothing more
21 special about the declarations than about the implementing
22 code. It's the implementing code that makes up a lot of this
23 platform.

24 So we've talked about functional, we've talked about small
25 portion. All of these factors so far, they all weigh in favor

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1 of finding fair use. Highly transformative, small portion
2 used, functional portion.

3 Now I want to talk about this factor at the bottom there.
4 Android's use of the API declarations did not harm Java. If
5 you copy someone's work and start selling that copy as your
6 own, you can understand how the original work might suffer from
7 harm. Right? It's not fair use to just massively copy the
8 whole thing and start selling it as your own. That's not
9 anything like what's happened here.

10 This factor considers whether the new work is a substitute
11 for the old. That's the key to this factor. Whether the
12 accused work, that's the -- that's Android, is offered or used
13 as a substitute for the original work.

14 Well, you now know that that is certainly not true.
15 Java SE is intended, always was, for desktops and servers.
16 That's what we're showing here. That's what Java SE is all
17 about. Desktops and servers. You haven't heard any testimony,
18 none, that there's been harm to Oracle in these markets.
19 Nobody came in here and said, "Oh, we're suffering in our
20 desktop or server market." Nothing. Not even an effort to
21 prove that. And the standard is has there been harm to the
22 copyrighted work. So they didn't present anything.

23 We actually proved through Professor Leonard and through
24 Dr. Jaffe's admissions that the opposite is true. Java SE is
25 doing fine. I examined Dr. Jaffe on this.

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1 "As far as you know, that part of Oracle's business, by
2 that I mean Java SE, is doing just fine?

3 "Oracle continues to license in those markets."

4 Now, he didn't do his homework, Dr. Jaffe. We know that.
5 It was embarrassing. I asked him, "So even though you knew
6 that the copyrighted work was Java SE, you didn't go to the
7 trouble of talking to the SE manager to see how he was doing?"
8 You heard him testify he had access to anybody he wanted to
9 talk to. All those depositions, all those exhibits, he could
10 have talked to anybody.

11 "No.

12 "Did you have Keystone" -- that's his support group -- "do
13 that?

14 "No.

15 "Did anybody do that?

16 "Not that I know of."

17 I mean, he completely failed to do the most basic
18 fundamental homework, particularly a noted economist, should
19 do.

20 But, again, we know what happened because we have
21 testimony from Mr. Smith. He's their official corporate
22 representative and he runs a part of Java SE. What did he say?

23 "Well, Java SE, Java SE Advanced is growing well. Support
24 revenue is growing well.

25 "How is the business doing overall?

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1 "It's growing well. Java SE is doing just fine."

2 And you didn't hear any testimony or evidence to the
3 contrary there.

4 And you heard Professor Leonard, who was one of our final
5 witnesses on Thursday. He said they're not substitutes.
6 Android is not a substitute. Java SE is on personal computers;
7 Android is on smartphones. If you are buying a personal
8 computer, you want to buy a personal computer or desktop. You
9 don't go out and look for Android or any smartphone. He also
10 said Java SE is not the same as Android in any respect. It's
11 an applications programming framework. It's nothing like that
12 full stack you saw. It's a little sliver of that stack.
13 That's another reason why they're not substitutes.

14 And Java ME. Why am I talking about Java ME? It's not
15 the copyrighted work. Java SE is the copyrighted work. I'm
16 talking about it because the only even theory of harm that
17 Oracle advanced was as to Java ME. That's the only theory.
18 But they don't have any evidence again to back it up. ME means
19 Micro Edition.

20 So Micro Edition -- the evidence is undisputed that the
21 Micro Edition was created for small, simple devices, and it
22 won't even support a smartphone. So Android is not replacing
23 ME or a substitute for ME either because ME is for feature
24 phones like these. Much simpler; right? No touch screen, no
25 GPS. Much simpler. And coke machines and set-top boxes and

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1 things like that that are much, much simpler. And there isn't
2 even a dispute about it.

3 This document we showed you from inside Sun in 2009, even
4 the folks at Sun agree with us on this. That Java there in the
5 middle, it's in the feature phone business. That's where Java
6 is.

7 The smartphone market is different. They're showing it as
8 a separate market. And who's in that? Well, my -- Windows
9 Mobile barely makes it in. But iPhone and Android. iPhone and
10 Android. They're in a different market; right? This is Sun.
11 This isn't anything that we prepared. This was prepared by Sun
12 in the ordinary course of business. Smartphone market,
13 separate from feature phone market, and all of the testimony
14 was to the same effect.

15 Here is Mr. Rizvi, whom you heard from, again under oath
16 during our portion of the case on video. We asked him what
17 would be missing from Java ME? That's the question.

18 "I couldn't give you the details, but Java ME is not fully
19 capable for what is required by a smartphone."

20 And that was backed up and supported by every other
21 witness. Mr. Stahl said it, Mr. Rizvi said it, Mr. Gering said
22 it. Java ME is for small simple devices, not a smartphone. So
23 Android isn't replacing that.

24 And this next slide shows that it's true. They knew at
25 Sun a year before Android was even announced that if they

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1 didn't do something with Java ME, it was going to fall off the
2 map. Not because of Android, but because of the transition in
3 the market to smartphones. Right? iPhone was out. They could
4 see that the market was moving and that ME wasn't in that
5 market, and so the folks at Sun understood full well and they
6 did nothing, nothing to change it.

7 Now, there's also evidence for you to consider that
8 Android has helped Java. It's helped Java because it is now
9 the number one smartphone in the world and it's written in the
10 Java programming language, which means that Java developers can
11 write applications and programs for Android without learning a
12 new language. And their witness, Mr. Stahl, agrees with us on
13 this.

14 "Do you believe that the existence of Android is a
15 positive for the mobile phone market as a whole? Not a
16 negative, a positive?

17 "Yes."

18 This is their vice-president of product management.

19 "I think the existence of Android is positive for the
20 mobile phone market. And Android is an example of the
21 widely-available platform. And it's good for Java developers,
22 too."

23 Android has lifted up the use of the Java programming
24 language, as Professor Astrachan told you in this next one.

25 "What's your understanding of Java's place in the world of

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1 programming languages today?"

2 Thank you, Christa.

3 Oracle's website says that Java is the number one
4 programming language. So not only is Java SE doing fine, but
5 the language is doing fine. It's the number one programming
6 language in the world now.

7 So where are we? All the factors that we've talked about
8 favor a finding of fair use. And it's not particularly close
9 either. The purpose and character, highly transformative, a
10 brand new platform. The nature of the SE declarations, the API
11 declarations, they're functional. The amount and
12 substantiality used, a tiny fraction, less than a half of one
13 percent. The effect on the market, not a substitute.

14 Here's another factor that's relevant. Good faith and
15 industry practice. Google engineers and managers acted in good
16 faith and consistent with industry practice.

17 Why do we know that? Virtually every computer programmer
18 that testified or computer scientist said reimplementing APIs
19 is common. It's often done. Sun did it. Everybody did it.
20 Everybody understood that API interfaces are open.

21 Let's go back to this next one.

22 So Judge Alsup will tell you that in evaluating the good
23 faith question, you may take into account the extent to which
24 Google relied upon or didn't any recognized practices in the
25 industry concern reimplementation of API libraries. So that's

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1 one of the issues that you are entitled to consider.

2 Well, you heard example after example after example from
3 all of the computer science folks and the programmers that from
4 their understanding, using open interfaces like the API
5 declarations in this case and writing your own implementing
6 code was common, accepted, and widely done, and we know that's
7 true at Sun because Mr. Schwartz said over and over, you can
8 use these APIs. You can use the interfaces. They're open and
9 free. They're part of the language.

10 Here's what Dr. Bloch testified to. I'm not going to go
11 through every one of these, but I'll go through this one at
12 least.

13 "Why did you think it was okay to reimplement the Perl 5
14 Regular Expression API?"

15 Now, remember, Dr. Bloch was at Sun. And he is testifying
16 that Sun itself is taking an API created by someone else from
17 the Perl language and doing their own independent version of it
18 without taking a license. They didn't take a license. That's
19 what Dr. Bloch said.

20 So Sun itself was engaging in this practice and they put
21 this Regular Expression API right into Java. One of the Java
22 APIs that's at issue in this case is from Perl, reimplemented
23 and placed there by Sun. Now, that was just Dr. Bloch. But
24 every single computer programmer or computer scientist that
25 testified has had an example.

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1 Mr. Schmidt talked about an example that he was aware of
2 when he was at Sun. They took a Microsoft API called Wahoo and
3 they reimplemented that.

4 Mr. Schwartz talked about it. Mr. Page, when he was here
5 Friday -- Thursday said we've always understood that using APIs
6 and interfaces is acceptable and common.

7 Mr. Bornstein said it. Mr. Phipps said it. Professor
8 Astrachan gave us three separate examples. Three separate
9 examples. Solaris, open office, those were examples of
10 reimplementing, creating an independent implementation of
11 someone else's API at Sun. At Sun itself. In products that
12 Sun is selling.

13 So this practice explains why, number one, there was no
14 human pride. In '07 when Google released Android, they posted
15 on a website the software development kit, SDK, and that kit is
16 on a website that anybody can access, and it lists all the APIs
17 that are going to be used in Android. And Sun was fully aware
18 of what they were and Sun understood, just like everybody else,
19 that as long as you write your own implementing code, as long
20 as you do that, that's fine. You're okay.

21 These interfaces are being shared and they're open, and
22 that explains Google's reaction when Oracle first raised a
23 claim that something was wrong or that Google needed a license.
24 That happened many years later. After Mr. Ellison acquired
25 Oracle, after he tried and failed to build a smartphone, after

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1 he tried to sell technology to Sun.

2 Let me -- can I put the timeline back up that we had up
3 there, Mr. Dahm. The timeline -- because I forgot to cover one
4 point. There is an exhibit that you saw during Ms. Catz
5 examination. I believe it's TX 7406. We didn't talk much
6 about it, but it proves my point that what Mr. Ellison was
7 trying to do was sell technology to Google before he claimed
8 anything was wrong. That slide deck was prepared for him by
9 folks at Sun, and take a look at it. It doesn't say Android is
10 infringement, Android is wrong, Android needs a license. It's
11 an effort to sell Sun technology to Google for use in Android.
12 And that just finishes out that part of the story that I forgot
13 to mention. That's the subject of TX 7406.

14 So let's go back to where we are and put up TX 1074. This
15 is the last exhibit that I'm going to present in this portion
16 of the program.

17 This was Google's reaction when Oracle first said, "Oh,
18 boy, you need a license." They said, "We will not pay for code
19 that we are not using because the implementing code is all
20 original, for a license IP that we strongly believe we are not
21 violating and that you refuse to enumerate."

22 Google's position then is the same as Google's position
23 now. Android doesn't use any proprietary technology. Android
24 is a fair use of free and open API declarations that have been
25 open for years, made open by Sun. Android was endorsed by Sun,

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1 supported by Sun. And you can't come around three, four, five
2 years later when you are the same company and say, "No, no, no.
3 We want to go back to the start and change everything." That's
4 not fair. That's not right.

5 All of the evidence, ladies and gentlemen, on fair use
6 favors a finding of fair use. And I'm not going to say much
7 more about that now, other than to say that it's particularly
8 important in a case like this where we're talking about
9 innovation and advance and where we are talking about something
10 that has changed everything, something that's out there, open
11 source, available for everyone to use. That is the very
12 definition of something that fair use was intended to endorse,
13 encourage and protect.

14 And now I'm going to stop talking. I'm going to say thank
15 you for your attention one more time. You're going to get a
16 break, and you will hear from the Oracle lawyers, and I'll get
17 a short amount of time when that's over to wrap up and rebut.

18 And again, thanks very much for your attention on behalf
19 of Google.

20 Thank you, Your Honor.

21 **THE COURT:** All right. Thank you, Mr. Van Nest.

22 We will take a 15-minute break. Remember now no talking
23 about the case. It will be your duty to talk about the case in
24 a few hours, but not yet. Please remember the admonition.

25 (Proceedings were heard out of presence of the jury:)

PROCEEDINGS

1 **THE COURT:** Be seated, please.

2 Let me -- I have got a couple of questions for you.

3 Some of the exhibits are in CD form, like the programs,
4 the JavaOne programs. Have the lawyers loaded those on to the
5 computer to go into the jury room?

6 **MS. HURST:** Yes, Your Honor. Anything that was only
7 available in native format, such as the source code, has been
8 loaded.

9 **THE COURT:** Okay. I may need then to explain that to
10 the jury so that they will know how to use it.

11 Have your lawyers looked at the instructions that go with
12 that little computer? Is it clear enough so the jury can
13 figure it out?

14 **MR. VAN NEST:** It is, Your Honor.

15 **THE COURT:** All right. Great.

16 Second question is we have given a little small handout of
17 this timeline to the jury and they all have their own. Is
18 there any value in sending the big poster board into the jury
19 room so that they can use it for their discussion?

20 **MR. VAN NEST:** Sure. I think we should.

21 **THE COURT:** What do you say?

22 **MR. BICKS:** That's fine.

23 **THE COURT:** Okay. We'll do that then. Anything else
24 the lawyers need me for?

25 **MR. VAN NEST:** No, Your Honor.

PROCEEDINGS

1 **MR. BICKS:** No.

2 **THE COURT:** Mr. Bicks, feel free to set up any way you
3 want. You will have an hour and a half.

4 By the way, you have 25 minutes left. Twenty-five
5 minutes. You used an hour and five minutes.

6 **MR. VAN NEST:** Thank you.

7 (Recess taken from 9:22 a.m. to 9:37 a.m.)

8 **THE COURT:** Let's go back to work.
9 Counsel, are you ready?

10 **MR. BICKS:** Yes, Your Honor.

11 **THE COURT:** All right. Let's see if the jury is
12 ready.

13 **THE CLERK:** Okay, Judge.

14 **MR. VAN NEST:** Your Honor, we're going to break after
15 Mr. --

16 **THE COURT:** Yes.

17 I'm assuming you're going to use about an hour and a half.

18 **MR. BICKS:** Yes.

19 **THE COURT:** Very close. So take a break at that time.

20 **MR. BICKS:** Yeah. Thank you, Your Honor.

21 (Jury enters at 9:37 a.m.)

22 **THE COURT:** Welcome back. Be seated.

23 Do you need more pages in another notebook?

24 **JUROR MS. SHATTUCK:** I left my notebook.

25 **THE COURT:** Why don't you run back and get your

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1 notebook.

2 **JUROR MS. SHATTUCK:** Thank you very much.

3 (Juror exits courtroom.)

4 **THE COURT:** Yeah. I noticed that you were about to
5 lose some pages from your notebooks.

6 (Jury enters courtroom.)

7 **THE COURT:** Ms. Shattuck, are you doing okay today?

8 **JUROR MS. SHATTUCK:** Yes.

9 **THE COURT:** How are the bee stings?

10 **JUROR MS. SHATTUCK:** Much better. Thank you.

11 **THE COURT:** Ready now?

12 Now, at this time, on behalf of Oracle America, Mr. Bicks
13 will give the closing argument.

14 The floor is yours.

15 **CLOSING ARGUMENT**

16 **MR. BICKS:** Thank you, Your Honor.

17 And good morning, ladies and gentlemen. I am really
18 thrilled to deliver this closing statement to you all.

19 I stood before you in the opening and I told you that I
20 was going to speak about the evidence. And I told you in this
21 case that I would be sharing with you evidence that came from
22 the files of Google and evidence that they never thought would
23 see the light of day.

24 And over the next hour and a half, I'm going to share that
25 evidence with you and now tie it to the questions that you as

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1 this jury are going to answer.

2 And before I want to do that, I really do want to thank
3 you. I want to thank you on behalf of the women and men of
4 Oracle because you all have been working hard, and we see that.

5 This is a tough case, but it is an important case. And I
6 said it was an important case in the opening statement because
7 it gets down to a very simple rule. You don't take people's
8 property without permission and use it for your own benefit.

9 And that's the rule that has been broken in this case.
10 Google took a shortcut. And they took a shortcut at Oracle's
11 expense.

12 I'm going to talk to you about the evidence. And the
13 first question is: Why? Why are we here? And I'm going to
14 start walking through some of the reasons.

15 Google did not want to get locked out. Trial Exhibit 31.

16 According to Mr. Schmidt, who was here, they wanted a
17 quick time to market, as quick as they could. In evidence, on
18 the stand.

19 \$60 million was on the line for the founders of Android.
20 It would be forfeited if they didn't get a phone on the market
21 in three years. The clock was ticking as soon as they bought
22 Android.

23 They were under incredible schedule pressure. You heard
24 that from Mr. Rubin on the stand. Incredible schedule
25 pressure.

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1 Mr. Page, CEO, he was disappointed in Android's timing.
2 You saw that in evidence. Trial Exhibit 401, an internal
3 meeting. He was disappointed.

4 Mr. Rubin, the clock was ticking. They were "beyond out
5 of time." Evidence that came in, in this case.

6 "If we miss the mobile window," their words, Google was
7 going to be "out of business in 10 years."

8 Those were their words in internal documents that were
9 produced in this case. That's why we're here.

10 This email from the CEO of Sun, Scott McNealy. Google was
11 immune from the copyright laws. This is what was said.
12 Internal memo. Their own CEO at the time, "immune from the
13 copyright laws." Good citizenship. A document written at the
14 time before lawyers came into court. That's what this case is
15 about. A company that believes that it is immune from the
16 copyright laws.

17 And Mr. Rubin was here on the stand, and he said that he
18 wanted to win.

19 Wanting to win can be okay. But when you want to win and
20 you break the rules, that is not okay. Oracle is a competitor.
21 And they're a fierce competitor. But when you compete, you
22 need to play by the rules and not take shortcuts. And in this
23 case Google took shortcuts.

24 One of the most important pieces of evidence is August 6,
25 2010, because this document disproves everything that was

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1 stated over the last hour.

2 You heard from Google that everybody thought what they
3 were doing was okay; that they didn't need a license; that the
4 APIs were open and free. But that's not what the internal
5 documents say. That's not what the evidence shows.

6 Trial Exhibit 10. A document written and an investigation
7 undertaken at the request of Mr. Page, who was actually on the
8 stand, done by Tim Lindholm.

9 He looked at whether or not there were any alternatives to
10 Java -- right before this case was filed -- and he concluded
11 that the alternatives all suck. Their words; not mine. And
12 that they needed a license. They needed permission. And they
13 never took a license. They went forward. And that's what this
14 case is about. This is critical evidence. Trial Exhibit 10.

15 What was the impact of this? Google suggested there was
16 no impact.

17 You heard Neal Civjan on the stand. He was head of
18 worldwide Java sales. He said to you the impact of what
19 Android did was devastating. And that's what I'm going to talk
20 to you and tie the evidence together.

21 All of these companies had licenses. They played by the
22 rules. And that was the evidence in the case. Every one of
23 these companies.

24 And I want to mention right here, right now, IBM, because
25 it was suggested that there was this practice out there where

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1 people were taking these APIs without permission.

2 Ladies and gentlemen, IBM had a license. And every one of
3 these companies had licenses because they played by the rules.
4 They didn't take shortcuts.

5 When Mr. Page was here, I asked him: Can you name a
6 single company that uses these Java APIs that has not taken a
7 license from Sun or Oracle, aside from Google?

8 I asked him on the stand. He's the top executive. Not
9 one company could he identify. Not one. And he stood by
10 testimony that he had given before, that the judge spoke about.

11 And what I also found interesting, as the man who came to
12 this courtroom, I asked him did he know that this case was
13 about his company taking more than 11,000 lines of code and
14 copying the structure, sequence and organization of the 37
15 packages. And what did he say to us and to you as the jury?
16 "I don't know the detail of what's alleged."

17 He should have known the detail. And he should have
18 shared the detail with you as the jury.

19 The judge has told you in his instructions that Google's
20 use of the declaring lines of code and the structure, sequence
21 and organization of those 37 packages constitute copyright
22 infringement unless they can meet their burden on fair use.

23 Google has the burden of proof. I said that in the
24 opening, and I repeat it here. We don't have the burden.

25 But what I'm going to show you is a mountain of evidence

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1 that we've gotten in this case, and that we've put together to
2 present, that shows they haven't come anywhere near meeting
3 their burden of proof.

4 I put scales here to go through each of the factors,
5 because scales of justice are really what this is all about.
6 And the evidence will show that Google has not met its burden
7 of proof on each and every factor important to this case.

8 This, as I mentioned before, is a case that is about an
9 excuse. I call it the "fair use excuse."

10 And in all the documents that have been presented in this
11 case, you haven't seen one document where anybody at Google
12 ever, at the time, said they thought this was fair use.

13 The documents that I'm going to show you on a timeline in
14 a moment will show the exact opposite. They knew they were
15 breaking the rules. They knew they were taking shortcuts. And
16 they knew it was wrong. This is an excuse.

17 What are the factors? I'm going to go through each of
18 them because I think Google did not stay true to these factors
19 that will guide you because some of these factors they don't
20 like because they go against them.

21 Here are all the factors listed out. And I've put this up
22 before, both in my opening and in my mini opening. And now I
23 want to walk through each of the factors with you.

24 The first factor will be commerciality. And when you get
25 the instructions, the judge will give you examples of things

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1 that are fair use.

2 And I showed this in the opening. Things like
3 "criticism." Android was not criticism. Things like
4 "comment." Android was not comment. Things like use
5 "reporting." Android was not news reporting. Things like
6 teaching, for classroom use, "scholarship," "research."
7 Android was none of these. These are typical examples of
8 things that are fair use. Android fits none of these typical
9 examples.

10 On the question of commerciality, the nature and purpose,
11 what was this all about? The judge has already said that
12 everyone agrees here that their use was commercial. So that's
13 a factor that goes against Google.

14 Now, the question is, how much does that factor go against
15 Google? How commercial was this?

16 Ladies and gentlemen, this was real commercial.
17 \$42 billion of revenue tied directly to Android. Tied directly
18 to Android. Advertising on Android phones is both of this. Ad
19 revenues. That's how they made their money. \$42 billion of
20 revenue.

21 Their own internal documents, direct revenue impact. This
22 is right at the beginning, before they reached what they said
23 was escape velocity in 2010, right when things were taking off.

24 Their own internal documents say there's a direct revenue
25 impact from Android. And that's from advertising.

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1 Search plus Android is huge. 2009, before things took
2 off. Their words; not mine. Trial Exhibit 5183.

3 And then you heard Mr. Page. He said it was mind
4 boggling, when he was talking to shareholders. 700,000 phones
5 are lit up every day. Two days over the holiday weekend,
6 3.7 million Android's were activated. And he said "Wow." That
7 is hugely commercial.

8 Mr. Schmidt, I asked him the same thing. 1.5 million
9 activations per day. And then I said, Each and every one of
10 those activations, that has Oracle's intellectual property in
11 it, the design of those 37 packages. And he said that's true.

12 Then I asked, How do you make money? Is this profitable?
13 And he said it was "hugely profitable." It was lucrative
14 because there are more searches on the mobile phones, more ads
15 are seen, more clicks. And it is hugely profitable. And
16 that's what the evidence is. Hugely profitable. Trial Exhibit
17 951.

18 Trial Exhibit 190, a \$43 billion year ecosystem. And this
19 is just talking about one year. This is their document, a
20 \$43 billion a year ecosystem.

21 And they stood before you and they said, We give away
22 Android for free, as if there was no control. But this
23 internal document shows that they were worried about losing
24 control. Control was very important to them. Control of the
25 ecosystem.

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1 But this is the height of commerciality. One year, a
2 \$43 billion ecosystem. And tied directly to ad revenues.
3 Clicks that generate money.

4 And then we presented Dr. Jaffe, who looked at all the
5 evidence and confirmed that, of course, this is highly
6 commercial. That's the first question for you all to consider.
7 How commercial is this? Ladies and gentlemen, the evidence is
8 showing that this is highly commercial.

9 The second question is transformative. And I told you in
10 my opening that that's a term of legal art. And here's some
11 language from the jury instruction: "Further purpose." And
12 then I highlighted the word "distinct." You'll have the jury
13 instruction.

14 Did Google, when they copied Oracle's valuable property,
15 was it used for a distinct purpose? Did it alter the
16 expressive content with new expression? That's a question.
17 And was it a substitute or not? Three critical questions on
18 transformative use.

19 So what did the evidence show? It was not for a distinct
20 purpose. It did not alter the expressive content. And it was
21 a substitute. And let me walk through and show you what the
22 evidence shows on that.

23 They copied 11,500 lines of code. And these are all the
24 different versions of Android that came out and the lines of
25 code that they copied in each. You saw this from Dr. Zeidman.

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1 Undisputed. They took the code, they copied it, and then they
2 put it right into Android.

3 11,500 lines of code. And it varies a little bit
4 depending on which platform, which version. Very important
5 testimony, ladies and gentlemen. These -- this is testimony
6 from Google's own witnesses.

7 Mr. Ghuloum, he's an engineering manager. He said that
8 the classes that were, in other words, copied, serve the same
9 purpose at Android that they serve in Java. And he said, I
10 believe they serve the same purpose.

11 And one of the questions is, was it a distinct purpose?
12 Was it different or the same? Their own witnesses said when
13 they copied that code it did the same thing. It was used for
14 the same purpose.

15 Mr. Meier was asked, using these APIs, were they used,
16 because -- in the same way. The Java APIs that are available
17 in both platforms, would you expect them to work in the same
18 way? "Yes."

19 Testimony from two of their witnesses who said this. It
20 was used for the same purpose. It did the same thing.

21 You heard from Doug Schmidt, same purpose. The code was
22 not altered. When they put it in those billions of devices, it
23 did the same thing. Same purpose. That's what the evidence
24 showed.

25 He actually, Mr. Schmidt, looked at the actual packages.

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1 And he showed that the 37 that were used in Java were in
2 Android, and that they were used the same way.

3 And he picked out a specific example, the security
4 package. And he says they would also know how to use it in the
5 same way in Android. Same purpose. That's what the evidence
6 is showing. And some of that evidence came from Google's own
7 witnesses.

8 Google has acted as if, "Look at what we did; we're the
9 ones who wrote all this new code." But the actual fact is that
10 a lot of that code was written by others; and only 23 percent
11 even close to being written by Google. And that doesn't even
12 include all the Linux code underneath. If we calculated that,
13 it would be much, much less. Most of this code was written by
14 others, not Google.

15 And where was Java? Because we've got to talk about
16 substitute. What was the evidence about Java and where it was
17 in mobile phones?

18 Sun licensed Java SE for use in smartphones. That's what
19 the evidence shows. SE was in smartphones.

20 And Sun licensed Java ME for use in feature and
21 smartphones. That's what the evidence showed in the case.

22 And I underlined the word "license" because that was the
23 business model. Not building a phone, but licensing the Java
24 platform for others to use, and for royalties. Commercial
25 licenses.

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1 Now, Java was in feature and smartphones before Android
2 was launched. They were the market leaders in both areas.

3 And Sun, as well as others, anticipated that -- that
4 phones would become like mini computers, and that software like
5 the Standard Edition Java SE, which was used on desktops, would
6 transition to be used on mobile phones. And they knew that at
7 Sun. And they were licensing Java SE into mobile phones before
8 Android.

9 We know this from Neal Civjan, who said that Java was in
10 85 percent of the market. It was ubiquitous. That was his
11 testimony.

12 And when you look at phones, this is not a revolution.
13 This is an evolution. Phones have evolved over time. But Sun
14 and Java, in Java SE, were in the first smartphones. They were
15 there first.

16 Alan Brenner took the stand, and he said what percentage
17 of smartphones were Java-powered. Nearly 100 percent at that
18 time. And this is at 2006.

19 And same thing with Mr. Civjan: Our jury has heard the
20 phrase smartphone. Was Java in smartphones? "Java was in
21 smartphones."

22 RIM. Danger. SavaJe. These phones are not the same as
23 phones today. The hardware is different. But when you look at
24 what's inside, and you look under the hood, some of the same
25 software is used in those phones that are now being used on

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1 Android. The same API packages. And that's what this case, as
2 the judge said, is about, the use of those API packages that
3 the evidence showed served the same purpose.

4 The SavaJe phone, you heard a little bit about that.
5 Google was suggesting the phone wasn't a big success. It
6 wasn't a big success. But what was important about that phone
7 was it had a full stack operating system inside that was based
8 on Java SE. It was there, that technology.

9 And you heard from Mr. Schmidt that it was a full stack
10 operating system. It was there first. Inside of that phone,
11 Java SE was being used. And it was being licensed by SavaJe.

12 And what was SavaJe? What does that stand for? It's
13 Java SE. That's what that stands for.

14 And a piece of evidence that came up quickly, which I
15 didn't have a chance to focus on, was an internal email, Trial
16 Exhibit 5322, where Mr. Miner, from Google, says to Mr. Rubin,
17 If we were not doing what we're doing, SavaJe would probably
18 have gotten more funding.

19 SavaJe had run out of money. And Google is saying
20 internally here that they're looking at their phone compared to
21 SavaJe, and says, If it weren't for us, they probably would
22 have gotten more funding.

23 You heard from Mr. Rubin. Danger was one of the first
24 smartphones. And they were licensed from Sun. And they were
25 using Java SE in that phone. That's what the evidence showed.

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1 Java and -- through SE and license was there first.

2 And then I showed you the Touch Pro, which was a
3 Java-powered phone on a Microsoft operating system. And you
4 saw those phones. And then you saw the HTC Dream that came out
5 that same year, that also had Java in it.

6 If this isn't an example of a substitute, I don't know
7 what is a substitute. Keyboards, both had Internet access.
8 Both had instant messaging. Both of them had Java in them, on
9 different operating systems. This is an example of a
10 substitute, which shows that it is not transformative. This
11 was the first Android phone.

12 And this testimony, ladies and gentlemen, is absolutely
13 critical. This testimony by Mr. Rubin on this stand says that
14 Google was in the same industry with similar products to Sun.

15 There is no better evidence to show what a substitute is
16 when their own witness comes on the stand and says that it's
17 similar product in the same industry.

18 He says that they were competitors. That was testimony
19 that was given on this stand by Mr. Rubin.

20 Mr. Schwartz, a new competitor. People -- these folks
21 were competing in the same market. If they weren't in the same
22 market, they would not be competitors. But that was the
23 evidence that came on the stand.

24 And then an email from Mr. McNealy, the CEO of Sun, to
25 Mr. Schmidt. They were worried about revenues submarining.

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1 And if they weren't in the same market and were completely
2 different, how could one take away revenues from the other?

3 One of the great things about juries is common sense. And
4 this is common sense. He was worried about revenues being
5 submarined because they were going head to head in the market.
6 And Mr. Rubin said they were competitors.

7 And then Professor Jaffe confirms, from an economist's
8 perspective, that they were substitutes. One was taking the
9 place of the other.

10 Now, you heard reference to Mr. Barr's testimony, where he
11 used the word "transformative." But he was using a definition
12 given to him by a Google lawyer. That was not the definition
13 that applied in this case.

14 In other words, he said -- asked, Did it change the status
15 quo in a significant way? That's not what transformative is.

16 He was given the wrong definition when he gave that
17 testimony. The judge has indicated what's transformative.
18 Different purpose. Is it a substitute? And that was the wrong
19 definition.

20 I showed you this art in the opening because to me it was
21 a helpful way to understand what transformative is. Taking
22 computer Java code, which is used in the desktop or a mobile
23 phone, and then using it in artwork. This is an example of a
24 different purpose (indicating).

25 But taking Java API packages that are used in one HTC

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1 phone and then using them in another HTC phone, where the Java
2 APIs do the same thing, that is not transformative.

3 It's important to always recognize here that you have to
4 look at transformative against the commercialism, the
5 \$42 billion. Because the less something is transformative, the
6 more other factors like commercialism will dominate.

7 And that's important. You have to look at them together
8 here. And there is no question in this case the evidence has
9 shown that this is hugely commercial. No question about it.

10 Good faith. This, ladies and gentlemen, is a very
11 important topic because the instructions here tell you that
12 fair use presupposes good faith and fair dealing. And I want
13 to talk to good faith and fair dealing.

14 These are the documents that came from the files that I've
15 talked about throughout this case. And I'm going to walk
16 through them with you in order.

17 And I want to ask you, as you look at this, is this what
18 an innovative company does? Is this what an innovative company
19 does?

20 "Do Java anyway, and defend our decision, perhaps making
21 enemies along the way." They knew, when they decided to go
22 forward with Java, that they were going to make enemies along
23 the way. Trial Exhibit 7.

24 The APIs were copyrighted. Is this what an innovative
25 company does? Trial Exhibit 18, Mr. Rubin writing to

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1 Mr. Stein.

2 Ladies and gentlemen, remember the name Mr. Stein. Trial
3 Exhibit 18. The "java.lang APIs are copyrighted." That's the
4 declaring code. This is the title of the packages. They knew
5 that they were copyrighted. And that's what this document
6 says. March 24th, 2006, they know that they are copyrighted.

7 And the important thing I'm going to talk about in a
8 moment, this wasn't just known to Mr. Rubin, because when
9 Mr. Page was here I asked him about this. And I asked him did
10 he know.

11 Java.lang APIs are copyrighted. Did he share that
12 information with you? "I believe he shared that information
13 with me." Mr. Page knew that himself. That's what came out on
14 the witness stand. And he wasn't alone in knowing that.

15 Mr. Swetland, even he knew that Sun had at one point made
16 some claim about owning the copyright on the API method
17 signatures. He knew about it, that it was Sun's position. He
18 knew that. And he gave that testimony on videotape in this
19 case.

20 And Mr. Lee, he observed the copyright notices himself.
21 They all knew in Google about Sun's view that this was
22 copyrighted. And it's in this testimony and in these
23 documents, ladies and gentlemen.

24 What motivated them? Again, from their documents. These
25 are not my words; it's theirs.

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1 Their APIs were half-assed at best.

2 To hit those milestones and not be out of the market, they
3 were up against the clock. And they had to take a shortcut.
4 And their own internal documents, the folks who are working on
5 this, are saying that, We have a problem with our own API
6 packages. These are their words, ladies and gentlemen; not
7 mine. Trial Exhibit 215.

8 They make the decision, and they make it final on
9 August 16th, 2006. And they make that decision that they're
10 going forward with Java on that day not because of any blog
11 statement, because that didn't even happen at the time. They
12 already made the decision to go ahead and copy at that point,
13 knowing full well about the copyrights up to the highest level
14 of the company. Trial Exhibit 303.

15 And then as things move forward, you heard it from
16 Mr. Rubin, they were beyond out of time as the milestone date
17 was coming, and they had to get to market in three years. They
18 were beyond out of time. These were their words; not mine.

19 And then scrubbing out a few more Js, taking things out of
20 the source code that could get them in trouble. These come
21 from their own internal documents. Trial Exhibit 26. "Scrub
22 out a few more Js." Again, their words; not mine.

23 This is a really important legal -- important and a legal
24 issue. They were worried. Trial Exhibit 382. Don't
25 demonstrate to any Sun employees or lawyers.

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1 This is in 2008. If everything was open and free, and
2 everybody was allowed to do this, then why are they telling
3 people to don't let people at Sun know, and don't demonstrate
4 to any lawyers?

5 Ladies and gentlemen, because just like all this evidence,
6 they knew what they were doing was wrong. And I ask you, is
7 this what innovation is supposed to be about?

8 This, ladies and gentlemen, is critical evidence that came
9 in toward the end of the case.

10 Mr. Mazzocchi, you probably remember he came on the stand.
11 He was at Apache. The copyright on the API is real and hard to
12 ignore. And he sent this to the members at Apache.org.
13 Remember all about Apache. He came in here. He was one of the
14 key people on Harmony, that Harmony project. One of the three
15 people.

16 And he looked at what was going on and he said, We can't
17 pretend we don't know of any API that we infringed unless
18 explicitly mentioned. And he says here, the copyright on the
19 API is real and hard to ignore. Just like Mr. Rubin; just like
20 Mr. Page; just like Mr. Swetland. They all knew. And he
21 looked at this too, and said this is a problem that I see here.

22 And remember what I said about Mr. Stein, who was at
23 Google. He also said in here that simply by implementing the
24 class with the same signature of another, which is what Google
25 claims that it has done in -- in another namespace, and simply

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1 by looking at available Java docs, it could be considered
2 copyright infringement, even if the implementation is a clean
3 room.

4 And then he goes on and he says, "We are, in fact,
5 infringing on the spec lead copyright if we distribute
6 something that has not passed the TCK" -- the compatibility
7 kit -- "and we know that." He's saying as clear as day that
8 what was going on was improper. He's saying it right here.

9 And members at Apache.org, Greg Stein, he was examined on
10 the stand by Ms. Hurst. And it was established that Mr. Stein
11 was a member at Apache.org on that email list.

12 And remember when I said "Mr. Stein"? Mr. Stein was on
13 that same email from Mr. Rubin that said the APIs are
14 copyrighted.

15 This whole Apache story does not add up, ladies and
16 gentlemen. Google claims and is suggesting to you that somehow
17 Sun approved this.

18 Look at these documents. Apache didn't even end up with a
19 license. And this fellow knew this.

20 And Google is saying to you that there are all these
21 commercial products out there that are doing things like what
22 was going on here. And they mentioned IBM. IBM had a license.

23 And even internally at Apache, this man is saying what
24 they were doing was not consistent with the law. And this is
25 sent to members of Apache, including somebody at Google,

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1 Mr. Stein.

2 Internally, there were also documents which showed that
3 Google knew that what was going on at Apache Harmony was not
4 consistent with the licenses. This was the water under the
5 bridge email that I asked Mr. Schmidt about.

6 These restrictions prevent Apache Harmony from
7 independently implementing Java SE. They can't do that. The
8 restrictions are the license restrictions, the rules.

9 Not to mention Android, though that's water under the
10 bridge at this point. It was water under the bridge because
11 they had already decided to go ahead. The decision had been
12 final. And they wanted to make enemies along the way. Those
13 are their words; not my words.

14 Internally, again -- and I showed these internal documents
15 because the suggestion was made to you in this trial that
16 everybody at Google thought everything was fine. We saw
17 Mr. Schwartz's blog, and everything was okay.

18 But every one of these internal documents shows that
19 internally they knew they had a problem. And they were worried
20 all along about lawsuits, as they should have been.

21 And here's another internal document where they considered
22 in 2009, Why don't we buy the rights to Java to solve the
23 lawsuits we're facing? And Mr. Schmidt says, It was a clever
24 idea. I'll ask our team to pursue it.

25 Not just one email; not just two. There is a mountain of

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1 evidence which shows knowledge that what they were doing was
2 not right. It was not fair.

3 This, ladies and gentlemen, is another critical piece of
4 evidence. It came in fast through Mr. Mazzocchi, but this is
5 what he had to say.

6 And I don't know. We can put all the legalese aside,
7 transformative, some of the very complicated intellectual
8 property issues that you all have to grapple with in this case,
9 and we can bring it down to language of someone that cuts to
10 the chase and tells us what the case is really about.

11 April 20th, 2009, Mr. Mazzocchi, to all the members at
12 Apache.org: "What is Oracle going to do about Android's
13 ripping off some of their IP and getting away with it?" These
14 are his words, sent to members at Apache.org April 20th, 2009.

15 And that's what's happened here. But Oracle is not
16 letting Google get away with it. Just like what was said here
17 by Mr. Mazzocchi. "The alternatives all suck. We need to
18 negotiate a license." Their words; not mine. Up until
19 August 12, right before this case was filed. This is the
20 timeline of bad faith.

21 And when you deliberate, I would ask that you look at this
22 evidence, Trial Exhibit 10, the Mazzocchi emails, the making
23 enemies along the way. Those were what people were saying
24 before they would ever think that their thoughts would be
25 exposed to people like you. And these documents tell the

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1 truth. And they tell the whole truth.

2 And Mr. Rubin, he wanted to win. He wanted to win. And
3 he wanted to win at all costs. And you look at all those
4 internal emails that show what was really going on.

5 Wanting to win is okay. In fact, it's probably good. But
6 not when you take shortcuts and not when you break the rules.

7 So look at Mr. Schwartz's blog. We heard so much about
8 it. I got to examine him. And I want to remind you all the
9 evidence to what happened when he got on the stand.

10 This is what he said on the blog. "My heartfelt
11 congratulations." He was in a pickle. Remember I asked him,
12 it was lemons to lemonade; you had a bad situation; you were
13 gritting your teeth.

14 And I then I walked out email after email of what he was
15 actually saying at the time internally. He wasn't happy about
16 what was going on.

17 And all those emails I just showed from Google, they knew
18 that they had a problem. And so did Mr. Schwartz. Because he
19 said -- and this was from Mr. McNealy. And I asked him on the
20 stand -- Mr. McNealy was chairman of the board -- that Google
21 was immune from the copyright laws. He said, I don't disagree
22 with that.

23 He looked at that announcement that his blog addressed,
24 and he said it was crap. This is what he said internally when
25 he wrote that announcement. He wrote an email saying it was

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1 crap. Exhibit 2353.

2 And then he said, I have no clue what they're up to. My
3 sense is they are playing fast and loose with licensing terms.

4 Fast and loose with licensing terms. Those are the rules,
5 ladies and gentlemen. This is what Mr. Schwartz was saying
6 internally. Trial Exhibit 2368, playing fast and loose with
7 the licensing terms.

8 And then he says, They take Java for Android without
9 attribution or contribution. "This is why I love scroogle."
10 Those were his words at the time; not mine.

11 And then he writes the email to Ms. Catz and Mr. Ellison,
12 referring to what was going on as a battle. Calling this a
13 battle is not exactly saying we're happy about what's going on.

14 And you put all those emails together and you can see
15 exactly what was going on. Sun knew they were playing fast and
16 loose with the licensing rules. Sun was having a tough time.
17 You heard that.

18 And it takes somebody with strength and courage to stand
19 up to somebody like Google. And that's what Oracle has done.
20 Because you saw what Mr. Mazzocchi said. What is Oracle going
21 to do when they find out that Google is ripping off their IP?

22 And then Mr. Rubin, as if a business would rely on a blog
23 or a public announcement. Ms. Hurst asked him about the
24 OpenJDK announcement. And said, It wouldn't make business
25 sense to bet our whole project on an announcement.

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1 No executive bets their company on something it says in a
2 blog, particularly when all the internal documents show that
3 they knew what they were doing was not right to the point where
4 Mr. Schmidt was so worried that he thought about buying the
5 rights to Java. And he said yes.

6 If everything was fine, if everything was free, why would
7 the top executive be thinking about buying all the rights to
8 Java? It doesn't add up. The internal contemporaneous
9 documented story doesn't add up with the story that's being
10 told in the courtroom.

11 So when you put this Factor 1 together, Google hasn't met
12 its burden. It weighs in Oracle's favor.

13 Let's talk about creativity, because Judge Alsup has
14 already said in his instruction, because there was copyright
15 protection, that these APIs have a level of creativity.

16 And you all, in this case, will have to decide how
17 creative was this, what these people did?

18 Mark Reinhold was in the courtroom. And he testified as a
19 witness. You would think he would know about creativity,
20 because he designed this. It was his work, as he told you,
21 some of which took years to come up with these design of these
22 packages.

23 And he explained how creative it was when he was doing it.
24 And he said it is intensely creative. And he compared it to
25 *Harry Potter* and how those books related. And I'll come back

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1 to that.

2 Just like in *Harry Potter*, what we talked about here is
3 comparing these packages, methods, and headers, very much like
4 a book in a series. A book, title, chapter, topic sentence.

5 And what the evidence has shown here is that Google copied
6 all of that, except it was a book of 37 series. Each of these
7 packages is like a book. And they copied all of that, the
8 whole interrelationship; the titles, the chapters, each topic
9 sentence of every paragraph, and then how the books relate to
10 one another.

11 It's an easy way, I think, to maybe understand some of
12 this. Very much like that software map that Doug Schmidt
13 showed. But this was helpful for Dr. Reinhold as one of the
14 creators.

15 And one of the important things, when it comes to
16 creativity in the instructions, is when there are many possible
17 ways to structure, sequence and organize something it can be
18 highly creative.

19 So you have to ask yourself, what was the evidence on the
20 choices that were made to those who were writing these API
21 packages?

22 Dr. Reinhold would know because he was the individual who
23 was doing it. He says they are extremely expressive, and there
24 are an infinite number of creative choices in designing these
25 packages. This was his testimony -- and he was the one who

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1 designed some of these packages -- that there were an infinite
2 number of choices.

3 And here are what some of the choices are that he talked
4 about on the stand. When you're sitting down to design a
5 package, these are all the questions that may go through your
6 mind if you're doing this. No different than coming up with a
7 poem, writing a book, or anything else. These are the creative
8 choices that he spoke about.

9 Mr. Bloch, on their side, wrote a document saying that
10 this was an art, not a science, designing these API packages,
11 and strive for beauty. These were his words. That Exhibit
12 right there, Trial Exhibit 877.

13 Noble and rewarding craft. API design is tough. Again,
14 from Mr. Bloch. This is evidence from their witness about how
15 creative putting these packages together is.

16 And then he talked about, right, consistent with the
17 judge's instructions, creative writing and expression lie at
18 the heart of copyright protection.

19 And he talked about why some APIs are harder to write.
20 And he said because you have to figure out how best to express.
21 Those were his words, showing how creative this is.

22 Doug Schmidt talked about the degree of creativity, as
23 well, and all the choices that have to be made.

24 And let me show you what Bob Lee's testimony was, because
25 it happened quickly. But he was asked -- he's at Google, one

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1 of the key people on these libraries. And he was asked how
2 creative is this.

3 (Videotaped testimony played as follows:

4 "Q. Would you say the -- designing APIs is a creative
5 activity?

6 "A. Yes, absolutely.")

7 **MR. BICKS:** Absolutely a creative activity.

8 There is a mountain of evidence from all of these
9 witnesses about how creative this is. And just because it's
10 functional -- and, of course, almost all computer code is
11 functional.

12 The question here is, how creative is it? Just because it
13 does two things, does important things, and is hugely creative
14 to get there, that doesn't take away from how creative it is.
15 And that's very, very important.

16 The labels that we heard about, we asked Dr. Reinhold, is
17 that really fair to call these things labels? You designed
18 them. And he said that was laughably simplistic, those labels.

19 He's the one who was at the bench. He's the one who put
20 his heart and soul into some of these packages. And they're
21 not labeled.

22 "Labels" are what people use when they're in a courtroom,
23 to try to minimize the creativity of the hard work of the
24 people who did this.

25 Factor 2, on creative, I believe, weighs in favor of

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1 Oracle based on that evidence.

2 Now, factor 3, what did they copy? How much? How
3 important? And the instruction here says that even a small
4 amount may be qualitatively the most important part of the
5 work.

6 If you take just a little bit and it's real important,
7 then this factor will go against you. You don't just look at
8 the amount. You have to look at how important it is.

9 So what was the evidence? Google says, Look. Look at how
10 much we did. Look at how much we did on our side.

11 Don't be tricked by that, because the total number of
12 lines in Android is not relevant here on this factor. That's
13 what the instruction says. That's not the right test.

14 So when you're looking at this, how much and how
15 important, be careful about the argument that I've heard in the
16 courtroom, which is, Let's look at what we did on our side,
17 over at Google.

18 That's not part of this.

19 This, you saw, was the software map that Mr. Schmidt
20 brought to court to show you, kind of like *Harry Potter*, how
21 connected all of this stuff is. The packages, the methods, the
22 interfaces, how connected it is and how it works together.

23 And he showed you the software map that he prepared for
24 this case to help us. And he showed us that Google copied the
25 heart of that platform.

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1 And that, as we know, if you take this out, that not one
2 of those billions of phones would work. We know that. Nobody
3 disputed that. And this was the software platform that was
4 presented.

5 You heard from Mr. Schmidt that what they copied was
6 substantial. This was his testimony, his expert opinion.

7 And then you heard from Mr. Reinhold, back to *Harry*
8 *Potter*, how everything is connected; the headers or the
9 chapters, the topic sentences, and how they all connect
10 together. And he explained that on the stand.

11 And I want to come back to two very, very basic questions
12 that I ask myself. And I hope you will ask yourselves.

13 If this wasn't important, why did Google copy it? And if
14 it wasn't important, why didn't Google just write their own
15 declaring code?

16 They've got all the resources in the world. They've got
17 all these engineers. Why did they take it, if it wasn't so
18 important?

19 You don't check your common sense when you come to the
20 jury outside of the courtroom. And that's why juries, people
21 like you, are so great, because you bring common sense to this
22 case.

23 There's a reason they copied it. And the evidence shows
24 why they copied it. Because it was the heart. And I'll show
25 you some of their own internal evidence. They had used it

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1 before at Danger.

2 Mr. Rubin did when he actually had a license to use it.
3 And he said here in their documents -- not my words; their
4 documents -- the reasons to shift to a primarily Java API,
5 because it "saved us a pretty crazy amount of time."
6 Shortcuts, saving time. "A crazy amount of time."

7 And when you're competing, we all know that time is money.
8 And time can be big money. And this is what their internal
9 documents say about why they were doing this.

10 And when they went out to their customers, they were
11 telling them how important what they got was. And this was
12 evidence that, kind of, came in quickly because the case moved
13 fast. And I only showed you -- I think Ms. Hurst showed one or
14 two of these presentations.

15 But this was the evidence. And there are all the exhibit
16 numbers down at the bottom of this, of all the presentations
17 that they were making to customers.

18 And in those presentations they were telling them, look
19 what we've got: The Java class libraries. Java APIs.
20 Java.class.java files. 6 million developers are using this.

21 And this is when they're out giving private presentations,
22 this is what they're telling people that's showing how
23 important this is. Their own documents show how important it
24 is. Because this is what they were saying to people when they
25 wanted to get them onboard.

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1 So what's their argument that you've heard? Well, the
2 language is free, so we could use the language; and, therefore,
3 we could take the APIs. That's the suggestion. But that's not
4 what the evidence showed.

5 The APIs and the language are distinct parts of the
6 platform. You can go out and use the language and design your
7 own APIs. You know it would be hard work. And you know it
8 would take a lot of time. But the evidence was that that could
9 be done. And they didn't do it.

10 And you hear from Dr. Astrachan, the programming language
11 is different from the APIs. And he says yes. So this argument
12 that the language isn't free; therefore, you can steal the APIs
13 without a license does not add up. And that's not what the
14 evidence showed.

15 This is from their own senior vice president, testimony
16 that was given in this case. We did it by videotape. Very
17 important evidence. And I'm going to play it.

18 (Videotaped testimony played as follows:

19 "Again, that programming language and the libraries or
20 APIs are two completely separate things. And so with the
21 exception of the case that we talked this morning
22 java.lang.star, I think no programmer would consider them
23 to be part of the language.")

24 **MR. BICKS:** And remember what he says here, the
25 language is not part of the APIs.

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1 Now, the judge will instruct you that there were 170 lines
2 of code that were required. And the judge will also instruct
3 you that you do not take more than you need. And when you take
4 more than you need, that counts against fair use.

5 And remember, now, that Google took 11,500 lines of code.
6 11,500. That's what the evidence is showing. Substantiality,
7 that weighs in favor of Oracle.

8 And now let me talk to you about market harm. It's
9 important to remember that when we're talking about market
10 harm, we're talking about actual markets and potential markets.
11 Markets that exist and markets that may come to be at some
12 future time.

13 And it's important to remember that it's not just
14 licensing opportunities for Java Standard Edition -- and the
15 evidence, ladies and gentlemen, is the Java Standard Edition
16 was being licensed into mobile phones and smartphones -- but,
17 also, harm that can be done to something called derivatives.
18 Things that are related to Java Standard Edition.

19 You can't harm Java Standard Edition and you can't harm
20 something that's related to it. Something that's called a
21 derivative. You heard that in the case. And that's what this
22 instruction says.

23 There was evidence about how Java ME and SE fit together.
24 You heard that evidence in the case because Java SE is the
25 copyrighted work. But what the law says is that the

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1 copyrighted work is protected, and also work that is a
2 derivative of it, like Java ME is.

3 So you have to look at harm to Java SE and harm to
4 derivatives like Java ME, because Java ME was used in some
5 phones, and Java SE was also being licensed.

6 And when you're talking about harm, ladies and gentlemen,
7 you have to remember that the business model of Sun and Oracle
8 is licensing. Written contracts to allow somebody else to use
9 the Java platform, not to manufacture their own phone.

10 Just like Google is not a company that manufactures its
11 own phone, except I believe with one. But their main business
12 is an operating system where others make the phones, like
13 Samsung, LG, and other companies.

14 But it's very important, when we look at harm, we have to
15 make sure we remember what kind of business Sun and Oracle were
16 in. They license technology. They license it.

17 And now we're looking at Standard Edition and also this
18 question of derivatives. And so here is the testimony from
19 Mr. Screven, Mr. Reinhold, Mr. Brenner, and Owen Astrachan,
20 that ME, "I always view it as a little sibling" because it
21 doesn't have as many packages as Java SE, but there's some
22 overlap. Kind of like a little sibling. They sometimes call
23 it a "subset." Or here, "a derivative," what Mr. Brenner says.

24 But they're closely related. And you can see why.
25 Because when it actually comes to SavaJe, SavaJe was using ME

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1 and SE. And Danger had the license to ME, but they were using
2 SE. So some of these platforms, some of these SE and ME, they
3 get used together.

4 And then when they were developed, they kind of developed
5 in steps together. One goes in front. The other catches up.
6 And that's the way technology works.

7 Dr. Reinhold says that ME was derived from SE. And then
8 Mr. Brenner explained what I was talking about, the updated,
9 one in front of the other. SE, he says, We would regularly
10 update Java ME to track the development of Java SE. And that's
11 how they were being developed, kind of in tandem, one going out
12 in front of the other.

13 But ME is a derivative for purposes of this. That's what
14 the evidence is showing. And there's been no contrary evidence
15 by Google about this. So when you're looking at harm, you have
16 to look at both of those.

17 And Dr. Astrachan said the same thing, where he said 11 of
18 the Java SE packages, that's the same as in ME, he said.

19 Now, this is also important because everybody at the time
20 was seeing that SE was going to be important because these
21 phones are like computers. They really are. They're like
22 computers.

23 And that's why there was, kind of, a movement toward SE as
24 time was moving forward. And that's what Mr. Brenner
25 explained. And that's the same thing that Owen Astrachan,

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1 Dr. Astrachan was saying as well. And people were seeing that.

2 Capability, power, memory and so forth. That allowed us
3 to take on more of the scope of SE. That's what they were
4 focused on at Sun. And that's what SavaJe, which was Java SE,
5 they saw this coming. And they were working on it. And that
6 was opportunities for Sun and then Oracle. That's what the
7 evidence has shown.

8 Now, when we talk about the actual harm, we have presented
9 evidence -- and I will review it with you -- of actual harm
10 that has occurred in this case. But we didn't even have to
11 present that evidence. Though we did. Because it's the
12 potential for harm, which is what the jury instruction will
13 tell you will be important here. Actual present harm need not
14 be shown.

15 And when it comes to future harm, we don't even have to
16 show it with certainty. We just have to show that there's a
17 likelihood of it.

18 So let me review with you the evidence of harm, because
19 there was a lot of evidence on harm, actual harm.

20 To remind us of where Java was with Sun: Phenomenal
21 momentum in wireless. They were the market leader in
22 2004-2005. That's what the evidence was.

23 These people were not coming out of nowhere before
24 Android. They owned the market. They were the market leader.
25 And this is a document before litigation, before anybody wanted

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1 to come in and change something, that talks about phenomenal
2 momentum.

3 That's where they were in '06-'07. You heard from
4 Mr. Civjan. This is a document I used with him. This rolled
5 forward to the 2009 time period, when he's talking about where
6 Java was.

7 And you're saying here that they were in 2.6 billion
8 handsets. This is Trial Exhibit 9133. 6.5 million developers.
9 180 carriers. They're leading the market. And they were
10 leading the smartphone market.

11 And, yes, the smartphone market was different then than it
12 is now. But it was evolving and it was underway then. And
13 they had the toehold at this point in time. They had the
14 agreements with RIM. They had that deal with Danger. They had
15 the technology from SavaJe, because they bought SavaJe after, I
16 showed you, that funding dried up because of Android. Sun
17 owned that operating system from SavaJe.

18 And then we get to the evidence. And we started with
19 Ms. Catz and asked her about the harm. What harm, as you as
20 the CEO of your company, have you seen yourself? And this is
21 what she said: There's been a very negative effect on Sun and
22 Oracle.

23 And she went through that harm. And the first harm was
24 that the Java community had been forked. And that goes back to
25 the write once, run anywhere promise. That you write computer

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1 programs, and it runs on all different kinds of systems. All
2 different kinds of computers. All different phone computers.
3 It writes and runs on all of them. And that was part of the
4 promise and part of the value.

5 And what happened here is that Android was forking and
6 hurting that community because that write once, run anywhere
7 promise had been broken. And she testified to that harm.

8 Mr. Screven talked about it as well. The programmers were
9 getting locked into Android because their applications can't
10 run in other environments other than in Android. And that is
11 harm. That breaks the write once, run anywhere promise.

12 And then you heard about what I would call control; that
13 when it came to Android, they didn't want people forking their
14 own technology. They wanted to stop that. And they wanted to
15 define the standard and shape the ecosystem.

16 But when they did that, as Mr. Screven pointed out, they
17 locked out Java because it wasn't compatible with the Android
18 Operating System. And that's where the fork was. And that's a
19 type of harm.

20 And then this language, "carrying a stick can save lives."
21 There was a lot going on here about control of the platform,
22 which is what Google wanted. They wanted control and they
23 wanted to keep others, like Oracle, out. And remember the
24 document "locked out."

25 And then we got into specific companies where Oracle lost

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1 business. Samsung; ZTE; Motorola; BlackBerry. They don't take
2 licenses any more because they end up using Android instead of
3 entering into commercial contracts with Oracle. That was her
4 testimony. Specific companies that had licenses that were no
5 longer working with Oracle.

6 A specific example she used of Samsung, a \$40 million
7 license down to 1.

8 And let me come back to harm again because we were not
9 required to even prove harm. It was Google's burden to show
10 the absence of harm. But we showed evidence of actual lost
11 deals. 40 million to 1, Ms. Catz identified as a Samsung deal.

12 And nobody challenged that testimony. They didn't even
13 ask her a question about it on cross-examination. And they
14 didn't bring in a witness from Samsung to say, no, that's not
15 why that deal got lost. So this evidence went unchallenged
16 even though it was not our burden.

17 Mr. Civjan took the stand, and he addressed this both from
18 customers but from a human standpoint. The person who had
19 built the business, I think he had 133 people. And he was
20 proud.

21 And, by the way, he had no dog in this fight because he
22 wasn't even working for Oracle. He left Oracle. And he came
23 on the stand, and they attacked him about his LinkedIn page.
24 They didn't ask him about the deals that got lost and the
25 evidence about that.

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1 And he talked about not just the deals, but what it means
2 when you build up an organization and you establish your --
3 your team as the market leader, which they were. 85 percent of
4 the market, 2.6 billion phones.

5 We say those numbers and we throw them around in this
6 courtroom and in this trial. But we have to come back and
7 really say to ourselves, what does that mean? 2.6 billion
8 phones Java was in. They were the market leader.

9 And it's people like Neal Civjan and his team and others
10 who built that. And this is what he told you about the impact.

11 And then I asked him to describe to you all what was the
12 impact of Android. And he said because it was free, it
13 displaced Java and had a massive impact very quickly on his
14 business. That's what he said to you up on the stand.

15 And then we went through some of the specific companies.
16 Samsung; Motorola; HTC; Sony Ericsson. He said 50 to
17 60 percent of mobile phones were now using Android instead of
18 Java; whereas, before they had the whole market or
19 85/90 percent.

20 Android came in, and Android came in with Java's
21 technology in it. So they're competing against themselves in
22 the marketplace.

23 Somebody takes your property that you invested in and you
24 built, and you want to do something with it. And then you find
25 yourself out there trying to do something with it, and you come

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1 across somebody who took it from you and is then competing
2 against you for free.

3 And I want to come back to something that I've heard here
4 in this courtroom, which was Sun failed, Oracle failed; so,
5 therefore, we can take it.

6 When it's your property, and you write a book, that
7 doesn't mean somebody can come in, a movie company, and can
8 take your property and turn it into a movie without your
9 permission.

10 And even if you take that book and you try, and maybe
11 you're not successful at it, that still doesn't give somebody
12 the right to come and take your book from you.

13 Just doesn't -- just like it doesn't give you the right,
14 if you have a piece of property that you own, a parcel of land,
15 and you want to build something on it, and maybe you build it,
16 and it's a barn that doesn't stand up that well, somebody
17 doesn't get to come on your property and say, you know what,
18 you weren't good at building the barn; I'm going to come on
19 your property now and build a barn because you couldn't do it.

20 And I will show you in a moment that the evidence isn't
21 that Oracle failed. It's that Android took over the market.
22 And Oracle, like any smart company who's got shareholders, is
23 not going to throw good money after bad.

24 You have to remember that common sense about taking
25 somebody else's property. And Mr. Civjan also talked about

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1 massive lost revenues that he was projecting in various -- what
2 he called "A-Pac markets." Asian Pacific.

3 And I asked him about the morale that I had mentioned
4 before. And he said it was a huge success story of that
5 industry, and it was highjacked. They took our technology.
6 They gave it away for free. And they took our customers, and
7 it was devastating. And that's what he said on the stand. And
8 the cross-examination of him was what he said on his LinkedIn
9 page, that he had been good in Java sales.

10 He was good in Java sales. He was also selling Java not
11 just in phones. Java was used everywhere, in all the products
12 that he talked about. So it was a little bit of a slight of
13 hand to say to you that Java SE, oh, it's not doing that badly;
14 so, therefore, we didn't harm.

15 Java SE is used in multiple devices. And what we're
16 talking about now is the harm to the mobile space. So I don't
17 think that was fair.

18 You heard from Ms. Catz on the Kindle deal, because there
19 were two problems with Kindle, the evidence showed. The Kindle
20 Fire came out, and Java wasn't in it.

21 And then there was another Kindle, the Paperwhite, where
22 Oracle found themselves competing against themselves, where
23 somebody had taken their technology -- Google -- and was giving
24 it away for free. So they had to discount down 97 percent.
25 So, again, evidence of actual harm in the marketplace.

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1 And then we have Dr. Jaffe looked at all the evidence and
2 confirmed that there was significant harm, based on documents,
3 based on testimony, and based on the platform economic model
4 and what their business objectives were.

5 And then we looked at, from a practical standpoint, this
6 chart of -- of the smartphone market, of where Java was.

7 And, yes, it's absolutely true, in 2007, it was a smaller
8 market. But they had the toehold. They were in 70 percent of
9 those smartphones. RIM; Nokia; Danger. Those, at that time,
10 were the leaders in that market. iPhone wasn't even out
11 then. And that was the market position of Java in the
12 smartphone market.

13 And then Android took off, and now we see the harm that's
14 resulting.

15 So this is back to this question about -- we heard it
16 again and again -- the argument was, Oracle, you're bringing
17 this lawsuit because you couldn't do it.

18 That's not true. Oracle decided, and Ms. Catz said it --
19 and I'll show you testimony again -- in the 2011 time period,
20 that making a huge investment to build a phone, to buy a
21 company, to build a phone was not a good investment.

22 Why? Four years of copying had been going on up until
23 that point. And Android went, as I showed you, from basically
24 starting out as a startup to a \$43 billion ecosystem in two
25 years.

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1 And they decided it would be very difficult to compete
2 with free, because Android was too far out. And there's
3 nothing wrong with making smart business decisions when
4 somebody else takes your property and takes shortcuts and
5 doesn't play by the rules.

6 You can't do a -- point the finger and say it was okay for
7 me to steal because you didn't do it. That's not what fairness
8 is about. And that's not what fair use is about.

9 Mr. Ellison, we heard a lot about him. We heard two
10 things that he made a statement at JavaOne. But I want to make
11 sure we know a little bit about timing and use our common
12 sense.

13 Mr. Ellison made the comment at JavaOne in June. He
14 didn't even own Sun at that time. And he got up in a developer
15 conference in front of developers and basically said yes, we're
16 going to commit to investing in Java. And Oracle did.
17 Hundreds of millions of dollars, as Ms. Catz told you.

18 And it's actually true. He didn't get up at that public
19 forum, before he had even closed that deal, and said, I've got
20 an email from Java -- from Schwartz, indicating that there's
21 some battles, and I think there seems to be some serious issues
22 here involving licensing problems. Because Ms. Catz explained
23 that Jonathan Schwartz had told her, during that due diligence
24 before the deal closed, that there were problems, that this was
25 unlicensed.

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1 And it's absolutely true, Mr. Ellison didn't get up in a
2 public forum, in front of developers, and start making a public
3 ruckus related to Google. He didn't even own the company at
4 that time.

5 And there was a time and a place for everything. And you
6 heard from the evidence that after that deal closed, these
7 folks did sit down and try to work it out.

8 And you saw an email that was presented by Google, I
9 believe in the June time frame, right before the August email
10 from Mr. Lindholm, that said, "We needed to take a license."

11 And then that email was shown to you. One of the Google
12 people said, We didn't copy anything. We know that's not
13 truthful, because we're in this courtroom because it's been
14 determined that they copied 11,500 lines of code and the design
15 of all of those packages.

16 And you'll never see any email or document where somebody
17 at Google is saying, gee, we think we're okay because
18 Mr. Ellison got up in front of a developers conference, before
19 this deal closed, and made those statements. And you'll also
20 remember what he said, which was, I'd like to see some of those
21 phones be Sun phones, Java and Sun.

22 And business people don't always get up, particularly good
23 ones, and air their dirty laundry in public. But you can rest
24 assured, as you saw this documentary trail, and you saw that
25 email from Mr. Mazzocchi about Oracle being ripped off, that

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1 they were not happy. And for good reason. But there's a time
2 and a place to mention things.

3 Back to Mr. Ellison testimony. So I'm clear, it was
4 always the -- the evidence and the argument was these people
5 just failed, Oracle.

6 We know how good Oracle is as a company and all the great
7 things they've done. And we can probably rest assured that
8 with their brain power and talent, if it was playing fair, fair
9 competition, given what they had with Java, and given how
10 valuable that technology was, we'd probably, with common sense,
11 said they could have been a bigger player here, if someone
12 had't violated the rules; gotten out in front; took their
13 property; and then competing against them and giving it away
14 for free.

15 But what Mr. Ellison says here is that already -- there
16 was already a Java smartphone with a lot of momentum. And we
17 couldn't enter the smartphone market. That was the decision
18 that was made.

19 And same thing for Mr. Stahl. You heard testimony -- and
20 it's always tricky when you hear deposition clips, because
21 they're taken out of context. And he said that Android was
22 dominating the market.

23 Open source does not equal open season. You heard all of
24 this about OpenJDK. Oh, we could have done this differently.
25 We could have taken this other license.

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1 They didn't. And there was a reason. All their witnesses
2 said it was verboten. It was incompatible. And it was
3 incompatible with their policy of not using GPL, which is the
4 public license for core libraries.

5 All their witnesses said it wouldn't work because it was
6 designed by Sun to protect their commercial opportunities.
7 That was their licensing setup. And that was their right to
8 have those rules. And Google didn't like that license. They
9 already said it.

10 All of their witnesses said that was not compatible. And
11 the reason is, the evidence explained, that the companies who
12 use that license have to make all of their information public
13 when they make changes to the technology. And they don't do
14 that because they're competitors.

15 And it was set up that way by Sun because when there were
16 commercial opportunities, they wanted to be at the table
17 because it was their technology that was being licensed.

18 So none of this GPL license, they never took it. And they
19 say why they never took it. And they suggested that this
20 OpenJDK stuff, that that's what hurt. If anything hurt Oracle,
21 that that hurt them.

22 But the evidence from Mr. Civjan was: Didn't that reduce
23 the company's competitive advantage? He said it didn't really
24 impact the business. The OpenJDK didn't hurt Oracle, didn't
25 hurt Sun. So there was no evidence of that.

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1 **THE COURT:** Mr. Bicks, you're down to about three
2 minutes.

3 **MR. BICKS:** Thank you, Your Honor.

4 And then I asked their executives, would taking your
5 property unauthorized hurt your results? And they said that it
6 would.

7 And then I asked Mr. Page, look at it from our
8 perspective. Would the same apply to Oracle if you took our
9 property unauthorized -- which is what happened here -- could
10 that hurt us? And he said it could make things more expensive.
11 He said that.

12 And then when it came to their licenses, they wanted to
13 make sure that everybody goes by the terms. That's what
14 Mr. Schmidt said on his open source license. He wanted to make
15 sure that they play by the terms.

16 And then there was their own API license, 5250, where they
17 protected their APIs. But ours couldn't be protected. 5250.
18 That, to me, is being a little bit of a hypocrite.

19 And he said, I expect people to honor those contracts.
20 This was a teaching moment when Mr. Astrachan was here, and he
21 explained how he taught his students and what their rules were.
22 And he said even if things are unauthorized, you don't copy.
23 It must not be condoned. And such violations are contrary to
24 professional behavior.

25 That's what he teaches his students. And those are the

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1 rules that got broken here, the same ones that he teaches his
2 students at his class.

3 Final point. What happens if everybody did this, if it
4 was unrestricted and widespread? And Ms. Catz answered this
5 question for us. All of these markets where Oracle is in. All
6 of these markets Java is in. And she said, If everybody did
7 this, we wouldn't have a business any more. That's what she
8 said.

9 Final factor, they all weigh in our favor. And they have
10 not met their burden of proof. And that's what the evidence
11 shows.

12 This case, I told you in the beginning, is about decisions
13 and consequences.

14 You will see the verdict sheet. And you're going to have
15 to answer one question. Did they meet their burden of proof to
16 show that this was fair use?

17 And I believe the evidence has shown that this was not
18 fair use; that they made decisions; and the consequence has
19 harmed our client.

20 It's my time to sit down. I thank all of you so much.
21 And now it's their turn. And I won't be able to get up and I
22 won't be able to respond. But I hope you know by now that if I
23 had a chance to, I'd have something to say.

24 (Laughter)

25 **MR. BICKS:** As would Ms. Hurst.

PROCEEDINGS

1 But I'm going to ask, before I sit down, I wrote up on
2 this sheet all of the documents and all the trial exhibits that
3 I quoted from their files. Submarining; making enemies;
4 ripping off IP. Every document I wrote. Fast and loose. All
5 the evidence. Or at least what I considered some of the
6 critical ones.

7 And I hope before this case closes, that Google can
8 explain to you those internal documents that were written at
9 the time before anyone thought that folks like you would be
10 able to see it.

11 So thank you very much.

12 **THE COURT:** Thank you, Mr. Bicks.

13 We will take a 15-minute break. Please don't talk about
14 the case yet. It will be your duty to. When we come back, we
15 have 25 minutes of rebuttal from Google and about 20 minutes of
16 finishing up on the instructions. And then the case will be in
17 your hands. So getting very close. But, in the meantime, no
18 talking about the case.

19 We'll see you back here in 15 minutes.

20 **THE CLERK:** All rise.

21 (Jury out at 11:10 a.m.)

22 **THE COURT:** Be seated, please.

23 Do the lawyers need the judge for anything?

24 **MR. VAN NEST:** No, Your Honor.

25 **THE COURT:** Go ahead and set up the courtroom in the

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1 way that you wish.

2 **MR. VAN NEST:** Thank you.

3 **THE COURT:** And then getting down to the end, aren't
4 we? Okay. Thanks.

5 **MR. VAN NEST:** Thank you.

6 (Proceedings were heard in the presence of the jury:)

7 **THE COURT:** Everyone got their notepads? Okay.
8 Mr. Van Nest, you have 25 minutes.

9 **REBUTTAL ARGUMENT**

10 **MR. VAN NEST:** Thank you, Your Honor.

11 Welcome back, everyone, and again, thanks for your
12 patience and your tolerance and your attention. I have one
13 opportunity now --

14 **THE COURT:** I'm sorry. Wait. Somebody is waving at
15 us. What is it?

16 **THE CLERK:** Oh, okay.

17 **THE COURT:** I'm sorry for the interruption.

18 **MR. VAN NEST:** That's quite all right, your Honor. We
19 are going to look at a little more evidence before we close up.

20 So I want to start where I started because there's a huge
21 key functional point that wasn't even address the in the hour
22 and a half that Oracle spent discussing this. And that is that
23 Sun, from the very beginning of Java, not only made the
24 language free, but made the APIs open and free as part of their
25 whole business plan.

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1 Can I have Slide 2, please.

2 You heard from the people at Sun that were responsible for
3 Java and the Java APIs: Mr. Schmidt, who was the CTO there for
4 18 years, and Mr. Schwartz, who was there for 13 years, and
5 both rose to high positions. And what did they tell you? They
6 told you in testimony that has not been challenged, not when
7 they were on the stand and not during his closing argument,
8 that the APIs were given away with the language as part of
9 their whole plan to promote the popularity of Java.

10 Let's look at the next slide, Slide 3. This is what
11 Mr. Schmidt said.

12 "When Sun first released the language, were the APIs
13 included?

14 "Yes.

15 "Why was that done?

16 "It's not possible to use the language without the APIs."

17 And you heard testimony over and over. Mr. Bloch said it,
18 Dr. Reinhold said it, Mr. Smith said it, their corporate
19 representative: The APIs are critical to the language. No
20 they're not the language itself, that's right. They're
21 separate but they're an integral part and feature of this whole
22 thing that was given away from day one. It's rather
23 extraordinary it when someone like Google has to call their
24 Chief Technology Officer and their CEO to prove this. These
25 were their people speaking for their company at the time.

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1 Let's look at Slide 3.

2 You saw half a dozen quotes from Mr. Schwartz, which was
3 to the effect -- and it's exactly what we have been saying all
4 along and all the evidence backs it up. Not just from these
5 guys, but from everybody in the industry.

6 "Were the APIs marketed along with the language, in other
7 words free and open?

8 "Absolutely, yes."

9 Mr. Schwartz said they were free and open. He said they
10 were never considered proprietary during all the years he was
11 there at Sun. He said we shared them and compete on
12 implementations and his testimony was absolutely backed up by
13 the documents. Look at Slide 5. This is what Sun said at the
14 time.

15 They said publicly in a 10K filing, "We support open
16 interfaces," that's open APIs. That is written documentary
17 confirmation of this whole thing, this whole business plan at
18 Sun.

19 I heard a lot about stealing and theft. We're here
20 disputing whether or not Google's open use, which was made
21 known publicly, of APIs and interfaces that had been made free
22 and available by Sun is a fair use. I'm not sure why we're
23 talking about stealing and theft. Everything that Google did
24 was done in public, open source, on websites. Everybody knew
25 what was going on. This is exactly what Mr. Schwartz is

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1 talking about, open interfaces in their 10K.

2 And then what happened when Android launched? What
3 happened when Android launched was their publicly -- their
4 Chief Executive Officer on a Sun website said,
5 "Congratulations. Welcome. We want to support you. We want
6 to help you."

7 They don't have an answer for any of this. They suggested
8 that somehow he didn't believe this or that Mr. Ellison didn't
9 believe it when he waved the phone up in the air, but there is
10 internal debate at all companies. All companies there is
11 internal debate. There is thousands of emails in this case.
12 Sure. You can cherrypick emails and turn it into a battle of
13 little soundbites, but the people leading these companies,
14 leading Sun and leading Google at the time took the position
15 this was a fair use, it was not objected to, it was supported.
16 They don't have an answer for this.

17 Can I have Slide 10, please.

18 Slide 10. It's not just one post. It's over and over and
19 over, over a period of three years, meetings, emails, calls.
20 Mr. Schwartz to Mr. Schmidt. Mr. Gupta meeting with Mr. Rubin.
21 JavaOne in '08 where they show their new Java FX running on
22 Android.

23 What difference does it make what was being debated
24 internally at either Google or Sun? The record of what was
25 done between these companies is one of open discussion about

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1 Android. And that's why all these emails you saw about *oh,*
2 *critical license, must have a license, they're copyrighted,* we
3 know what that's about because, again, you've heard from the
4 critical people there: Mr. Rubin, Mr. Schwartz, Mr. Page, and
5 Mr. Schmidt. They talked about a different type of deal back
6 in the '05, '06 period that had absolutely nothing to do with
7 the Java APIs. It had to do with a fundamentally different
8 proposition. We'd like to get the Sun proprietary technology
9 and use it because if we could do that, this might shorten our
10 time to market.

11 Google didn't take a shortcut. A shortcut? It took five
12 years to get this product out. Shortcut? You heard the
13 testimony from Mr. Bornstein, Mr. Rubin, and Dr. Astrachan
14 about all the time and effort that went into building Android.
15 They were trying to cut that short by reaching an agreement
16 with Sun, but when they didn't, they went forward using the
17 free and open APIs that had been open for years by Sun and
18 built their own system by themselves using their own technology
19 and/or freely available open source technology. There were no
20 shortcuts taken whatsoever.

21 And by the way, the industry testimony you heard from
22 virtually every witness that's a programmer was to the effect
23 that forever and ever, programmers have believed the APIs to be
24 free and open.

25 Could I have Slide 15, please.

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1 You heard from Dr. Bloch who worked at Sun. "We
2 reimplemented APIs at Sun from other people."

3 You heard from Mr. Schmidt. "This was done at Sun."

4 You heard there Mr. Schwartz. "Examples of reimplementing
5 APIs at Sun."

6 Mr. Page, Mr. Bornstein, Mr. Phipps, they all talked about
7 using open free APIs, just like the electrical outlet and the
8 plug, just like the hamburger menu. Those were open and
9 shared, and you built your own implementation yourself. That's
10 what every one of these witnesses testified to and said was
11 customary and standard.

12 They don't have an answer for this. They haven't called
13 anyone here to tell you otherwise. It's their company. There
14 were lots of people working at Sun, not just Mr. Schwartz, not
15 just Mr. Phipps, not just Mr. Bloch. But no one came in here
16 and contradicted this testimony and the public record of making
17 the APIs open from day one.

18 Now, transformative use is a fundamental part of fair use.
19 As I said, fair use is the law and fair use is intended to
20 encourage innovation. That's why it's important to determine
21 whether Android was transformative or not.

22 You heard virtually nothing from Oracle about that except
23 one thing, which is it can't be transformative because they
24 used the same declarations, the labels that were in Java in
25 Android. Well, that's just wrong as a matter of law.

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1 Slide 17, please.

2 The law is a use can be transformative even if you're
3 using the material itself in the same way. That's what this
4 instruction says. To qualify as transformative, the material
5 copied need not be modified so long as the material qualifies
6 as transformative.

7 And the record now on transformative is also largely
8 undisputed. Both Professor Astrachan and Professor Schmidt
9 acknowledged all of the changes and differences that went into
10 Android.

11 Can I have the Android stack up, please.

12 That there was a selection made of only 37 packages. That
13 was brand new. No one else had identified those to be used in
14 a smartphone. New implementing code to make it work in a
15 mobile device. Add 100 Android libraries to give you all the
16 features you need: GPS, camera, accelerometer, all that. Add
17 these libraries, the green ones, from open source so you can
18 browse easily, so you can watch video, so you can have
19 graphics, play games, all of the things we do that we take for
20 granted now.

21 Build a new virtual machine, the Dalvik, from scratch to
22 make it go faster so people aren't sitting waiting on their
23 smartphones. Add Linux, an open source platform. And as
24 Professor Schmidt, their expert, said, every part of Android
25 was customized. Everything was done to make it work. It was

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1 like nothing else before it, including nothing else that either
2 Sun or Oracle had ever done with Java. And they're the
3 experts.

4 Our point about their failure to build their own is not a
5 criticism of them as companies in any way. It's to say it
6 proves this is transformative. If the experts that have been
7 working with Java and, in the case of Sun, that invented
8 Java -- if they aren't able to use Java SE to build a
9 smartphone, if this is all they can come up with, is a failure,
10 it suggests strongly that what Google did in Android is
11 transformative. It's something new, and a different use for
12 the APIs than anyone else had ever made.

13 Their response to that is well, it's commercial. They
14 made billions of dollars and so on and so forth. Well, let me
15 talk about that. Point one, you don't have to choose between
16 commercial and transformative. The law makes that clear, too.

17 Slide 51 please.

18 If something is highly transformative, the fact that it's
19 commercial doesn't matter. Why? Because the whole point of
20 fair use is to promote innovation. And if you're successfully
21 promoting something hugely innovative, then the fact that it's
22 also commercially successful doesn't count against you. That's
23 exactly what this jury instruction says, and I expect Judge
24 Alsup will read that to you shortly.

25 Secondly, the success of Android has nothing to do with

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1 these API labels. Right? These API labels were in SavaJe,
2 which was a failure. And the iPhone doesn't use Java at all.
3 So use your common sense. It can't possibly be that using
4 these labels, which were part of the language in effect, can
5 have fueled the success of something like Android. What fueled
6 the success of Android is all of the things that went into it
7 that are new and different, the things that made it what it is
8 today, not the labels from the method headers that are a form
9 of organization.

10 It's also the case that all this money they're talking
11 about, most of it, is not made by Google at all. This
12 ecosystem they're talking about -- remember, Android is open
13 source. Google gives it away. You can use it to build
14 whatever you want. So the money that's made, a lot of it is
15 made by developers who are selling apps, handset makers who are
16 selling phones, carriers who are selling phones, and Google
17 makes money, too, but not directly from Android.

18 The money Google makes is from its own proprietary and
19 famous technology, Google Search and Google Ads. That's
20 where -- the money that's made, even in relation to Android, is
21 not from Android itself and certainly not from these API
22 labels. It's made from Google Search, which runs on all
23 platforms. It runs on iPhone, runs on desktops, runs on
24 laptops. It's not unique or special to Android. It runs
25 everywhere. And the money that Google has made itself, that's

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1 where that money comes from.

2 Functional, why are we looking at *Harry Potter*? Why are
3 we looking at *Harry Potter*? It's an admission by them that
4 Android is obviously functional and so is Java. This isn't
5 about *Harry Potter*. It's not a novel. It's not a book. It's
6 not a series of books. It's highly functional, but they want
7 to talk about *Harry Potter* rather than what the labels do.

8 Can I have Slide 61?

9 This is the standard, the nature of the copyrighted work.
10 Now, we're looking at what is Java -- what are these labels?
11 That's the copyrighted work we're talking about. Right? So if
12 it's a traditional literary work, if it were *Harry Potter*, we
13 would be having a whole different discussion, but of course
14 we're not here about *Harry Potter*.

15 The more functional the work, the more this factor favors
16 fair use. Why? Because fair use is all about innovation. And
17 if what you are talking about is using something that's
18 functional that contributes to innovation, then there is less
19 copyright protection, more fair use and a greater desire to
20 allow this sort of thing that is functional and creates
21 innovation. We know what they are. There is no big secret.
22 62 tells us -- these are names and labels. They're the labels
23 that form the system of organization that are intended to be
24 used. Why is that important? They're intended to be used.
25 That's what Dr. Bloch said, Mr. Schwartz said, all the

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1 witnesses. These labels are not just for reading enjoyment or
2 like a play or a poem. They are used to call on implementing
3 code used by developers. That was the whole point of giving
4 them away, is to make the language itself more effective.
5 That's what all the witnesses have said, and so this is what
6 we're looking at, not *Harry Potter*. Java.net, java.io,
7 java.security, those are all very descriptive terms for what we
8 have, what existed in Java itself.

9 In other words, the method declarations in Java are not
10 literary works. It may have been hard to build them, it may
11 have been a creative process to build them, but that's not what
12 this factor is looking at. It's looking at what are they at
13 the end of the day when they've been completed.

14 Market harm. The point on market harm is now this. Even
15 they concede there hasn't been any harm to Java SE. Why would
16 they spend so much time talking about Java ME if they had a
17 great case on harm to Java SE? Why is there no harm to
18 Java SE? Java SE, that's the copyrighted work, is for desktops
19 and servers and large devices and it's doing fine. It's doing
20 fine. Nobody came in here and showed you any sales information
21 about Java SE going downhill. Nobody. And they still haven't
22 done it. They're trying to pivot to Java ME. But let's talk
23 about SE for a minute.

24 Could I have Slide 37 up.

25 Dr. Jaffe, even though he didn't do his homework, even

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1 their expert conceded that Java SE licensing is doing fine.
2 They want to say, well, forget about the fact that we don't
3 have a smartphone with Java SE. Okay. Because we're a
4 licensing company. Fine. If you're a licensing company, show
5 me the license agreements on Java SE where you're losing money.
6 Please. Show me. You've got an expert on there that's one of
7 the top economists, and what did he bring? Nothing. You
8 didn't see a single exhibit with Dr. Jaffe. Not one. Not one.

9 And what he said on cross was Java SE's doing fine. It's
10 doing fine. So did Mr. Smith.

11 Slide 38, please.

12 Their Java SE person that we went out and got the
13 discovery from, not Dr. Jaffe, this was his job. We went out
14 and asked this guy the questions. Mr. Smith, he is their
15 official witness. Very honest. "Java SE like Java SE Advanced
16 is growing well. Support revenue is growing well." There
17 isn't a scrap of evidence anywhere about Java SE. All you
18 heard about was Java ME.

19 Okay. Let's talk about Java ME. Java ME, number one, is
20 not the copyrighted work. It's not the copyrighted work, but
21 even if it were, they haven't shown any harm to Java ME.

22 Java ME doesn't compete with Android. Java ME is for feature
23 phones and small devices, not smartphones, as their witnesses
24 conceded.

25 Slide 39, please.

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1 They completely ignore this. They wave their arms. It's
2 been devastating, it's been miserable, but hey, you didn't
3 develop Java ME into the position where it could actually
4 support a smartphone, and so to the extent Java ME isn't doing
5 well, it's because the whole market has changed and you haven't
6 changed with it. That's not the kind of market harm that the
7 Copyright Act is talking about.

8 Android is not a substitute for Java ME. Android is part
9 of a whole new market, a brand new category that Java ME is not
10 capable of fulfilling. That's what Mr. Rizvi said, very clear.

11 And could I have Slide 40.

12 Mr. Stahl, "You don't believe Java ME has the features and
13 functionality needed for a smartphone?" This is one of their
14 vice-presidents of product management.

15 "I don't think it was ever intended for that. Java ME was
16 intentionally designed for resource-restricted hardware."

17 They're in here claiming that there's harm to that, but
18 that's -- the very nature of Java ME means they -- it can't
19 support a smartphone.

20 This is Mr. Stahl. I don't know how more definitive we
21 can get. "As hardware became more powerful, there would be no
22 reason, no reason to use ME."

23 And the same is true of what they said about Samsung and
24 all those other guys. Dr. Jaffe admitted that. The reason
25 Samsung is not re-upping, they want smartphones like Galaxy.

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1 Sun is not offering that. Java ME, not a smartphone, can't be
2 a smartphone.

3 So the whole idea of harm, they haven't proven that a bit.
4 We've shown that Android has created a brand new market and
5 brand new opportunity that has helped Java because it keeps
6 Java developers relevant and it has helped Java because now
7 Java language is still number one. That wouldn't be true
8 without Android. Android is the number one thing keeping Java
9 out there doing as well as it is.

10 Now, you saw a whole flood of emails, and in the time I
11 have, I'll say this. A trial is not a test of soundbites and
12 snippets. Mr. Bicks said it really well. A lot of those could
13 be taken out of context. You heard what the witness said about
14 scrubbing J words. They didn't have a trademark license.

15 You heard what Mr. Rubins said about APIs are
16 copyrightable. He's talking about the implementations, not the
17 labels.

18 There isn't a single document from anyone inside Sun,
19 anywhere else, that says Google was wrong or it was somehow a
20 violation to use these labels. In fact, the one document that
21 we do have is Slide 14. This is exactly what Google said to
22 Oracle the first time this came up, which was way, way, way
23 after Android was released.

24 "We're not going to pay for code we're not using and now
25 it's established that there is no implementing code in Android

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1 that was used from Java." That is an established fact. "We
2 are not going to license IP we strongly believe we are not
3 violating. APIs are open and free. And they've been open and
4 free and they have been open and free since day one at Sun with
5 Java. And you refuse to enumerate."

6 What Mr. Eustace is talking about here is the same thing
7 we're been talking about. Google didn't do anything wrong and
8 it was fair to do exactly what it did.

9 Could I have slide 1st, please.

10 **THE COURT:** You are down to about two minutes.

11 **MR. VAN NEST:** Thank you, Your Honor. So fair use is
12 not an excuse, ladies and gentlemen. We are here because the
13 law of copyright endorses and encourages fair use in the name
14 of innovation. That's what this says. The right of fair use
15 permits the use of a copyrighted work without the owner's
16 consent, without a license, without permission, and you can
17 read the jury instructions. You will hear them from Judge
18 Alsup. That's confirmed throughout.

19 And the point is to encourage the development of new ideas
20 built on earlier ones. And we living here in Northern
21 California know that the best; right? That's a key thing for
22 us. The air we breathe, the energy we use, the products we
23 use, the cars we drive, it all depends on innovation, and we're
24 number one in the world on innovation, and that's why fair use
25 is so important and so critical, and to ridicule it and call it

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1 an excuse is just flatout a lie. It's the law.

2 And in this case, Android is exactly the kind of
3 innovation that we should be encouraging in this country. It's
4 the kind of innovation that comes along once in a lifetime.
5 And I don't have to rely on principles like that.

6 The evidence in this case demonstrates that what Google
7 did was consistent with Sun's business practices, was supported
8 and applauded by Sun, was consistent with the law of fair use,
9 was a functional use in a transformative way that has
10 contributed to the success and betterment of lots and lots of
11 people in lots and lots of walks of life.

12 So again, ladies and gentlemen, fair use is important, and
13 I'm very happy to entrust this case to your care. Good luck in
14 your deliberations and thanks again for all your attention.

15 Thank you, Your Honor.

16 **THE COURT:** Thank you, Mr. Van Nest.

17 I have learned from other cases that many members of the
18 public would like to excuse themselves so they don't have to
19 sit through the reading of the instructions. Once I start, I
20 would like you to stay and not distract the jury by leaving.
21 I'm going to pause for a few minutes to let all of you who wish
22 to leave go ahead and leave.

23 This is a time-honored moment when the judge instructs the
24 jury on the law, and in the old days, you didn't get a copy of
25 the instructions. It was just done once verbally. And so by

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1 tradition, I insist that the gallery stay put so that you will
2 not be distracted. I will, though, give you a copy of these
3 instructions for your convenience in the jury room. So I will
4 now resume. I have about 20 minutes, and then the case is
5 yours.

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6
7 **THE COURT:** "Now I will turn to the law that applies
8 to this case. In this trial, it has already been established
9 that the Android versions in question used aspects of Java 2
10 Standard Edition Version 1.4 and Java 2 Standard Edition
11 Version 5.0, specifically using the declaring code and the
12 structure sequence, and organization of the 37 Java API
13 packages.

14 "The pertinent versions are: 1.0, 1.1, Cupcake, Donut,
15 Eclair, Froyo, Gingerbread, Honeycomb, Ice Cream Sandwich,
16 Jelly Bean, KitKat, Lollipop and Marshmallow.

17 "Google's use of the declaring lines of code and the
18 structure, sequence, and organization of those 37 API packages
19 constituted copyright infringement unless you find that Google
20 has carried its burden as to the defense of fair use. In other
21 words, for purposes of this trial, it is a given already
22 established that Google used certain aspects of copyrighted
23 works. And the question remaining for you to decide is whether
24 or not Google's use was a fair use.

25 "There is no contention, however, that Google copied the

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1 implementing code for the 37 API packages. The point of
2 contention is over the declaring lines of code within the 37
3 API packages, also referred to as declarations and header
4 lines, which Google concededly used in Android which reflect
5 the structure, sequence, and organization for the Java API
6 packages.

7 "Now I will explain what fair use means under the law."

8 And I'll pause here to say this is very similar, but
9 slightly different, from the instruction that I gave you at the
10 outset of the trial so please listen carefully.

11 "One policy behind our copyright law of course is to
12 protect the compositions of authors from exploitation by
13 others. When it applies, however, the right of fair use
14 permits the use of copyrighted works by others without the
15 copyright owner's consent.

16 "The policy behind the right of fair use is to encourage
17 and allow the development of new ideas that build on earlier
18 ones, thus providing a counterbalance to the copyright policy
19 to protect creative works.

20 "Since the Doctrine of Fair Use is an equitable rule of
21 reason, no generally-accepted definition is possible and each
22 case raising the question must be decided on its own facts.
23 And in this dispute between Oracle and Google, that question
24 falls to you for decision.

25 "Under the Copyright Act, an author owns the exclusive

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1 right to use or to license his or her writings or images or
2 other copyrightable works with the statutory exception that
3 anyone may make fair use of even a copyrighted work and may do
4 so without anyone's permission and without payment of money to
5 anyone.

6 "Specifically the act states" -- and I will quote it --
7 "the fair use of a copyrighted work for purposes such as
8 criticism, comment, news reporting, teaching, including
9 multiple copies for classroom use, scholarship or research is
10 not an infringement of copyright.

11 "In determining whether the use made of a work in any
12 particular case is a fair use, the factors to be considered
13 shall include, one, the purpose and character of the use,
14 including whether such use is of a commercial nature or is it
15 for non-profit educational purposes; two, the nature of the
16 copyrighted work; three, the amount and substantiality of the
17 portion used in relation to the copyrighted work as a whole;
18 and, four, the effect of the use upon the potential market for
19 or value of the copyrighted work.

20 "I have just quoted for you the right of fair use exactly
21 as enacted by Congress. As you just heard, the statute
22 includes several examples of some types of uses that may be
23 found to be fair uses. But that list is not exhaustive or
24 exclusive. In your deliberations, you must decide whether or
25 not Google has met its burden in this trial to prove that its

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1 copying was a fair use.

2 "Now I will further explain each of the four statutory
3 factors.

4 "The first statutory factor concerns the purpose and
5 character of the accused use. This factor includes these
6 issues: One, whether and to what extent the accused use serves
7 a commercial purpose, which weighs against fair use, versus a
8 nonprofit educational purpose, which weighs in favor of fair
9 use; and, two, whether and to what extent the accused work is
10 transformative, which supports fair use.

11 "Although the act does not explicitly use the word
12 *transformative*, our courts uniformly hold that the first
13 statutory factor calls for an evaluation whether and to what
14 extent the purpose and character of the accused use is
15 transformative.

16 "What does *transformative* mean? A use is transformative
17 if it adds something new with a further purpose or different
18 character, altering the first use with new expression, meaning,
19 or message rather than merely superseding the objects of the
20 original creation.

21 "New works have been found transformative when they use
22 copyrighted material for purposes distinct from the purpose of
23 the original material. A use is considered transformative only
24 where a defendant changes a plaintiff's copyrighted work, or
25 where the copyrighted elements remain unchanged from the

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1 original, a defendant uses them in a different context such
2 that the original work is transformed into a new creation.

3 "A work is not transformative where the user makes little
4 or no alteration to the expressive content or message of the
5 original work and uses it in the same or similar context.

6 "The extent of transformation may vary from case to case.
7 The greater the transformation, the more likely an accused use
8 will qualify as a fair use. And the less the transformation,
9 the less likely an accused use will qualify as a fair use.

10 "To qualify as transformative, the material copyrighted
11 need not be modified in the new work so long as the material
12 and the context into which the material is used qualifies as
13 transformative under the test stated above.

14 "In this case, Google contends that it used the exact
15 lines of declaring code at issue and their SSO, together with
16 new implementing code and additional technology as part of a
17 new platform for mobile devices.

18 "Oracle contends that Sun was already using, licensing,
19 and adapting the copyrighted works in mobile and other devices.
20 It is up to you to decide the extent to which Google's use
21 qualifies as transformative under the test stated above. But
22 you may not disqualify it from being transformative merely
23 because the declaring code and the SSO were carried over
24 without change.

25 "On the other hand, even if you find that the accused use

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1 was transformative, you must weigh that and the extent of the
2 transformativeness against the commercial purpose of the use
3 and its extent, which I will now discuss.

4 "In evaluating the first statutory factor, the extent of
5 the commercial nature of the accused use must be considered.
6 In this case, all agree that Google's accused use was
7 commercial in nature but disagree over the extent.

8 "Commercial use weighs against a finding of fair use, but
9 even a commercial use may be found or not found, as the case
10 may be, to be sufficiently transformative that the first
11 statutory factor on balance sometime cuts in favor of fair use.

12 "To put it differently, the more transformative an accused
13 work, the more other factors, such as commercialism, will
14 recede in importance.

15 "By contrast, the less transformative the accused work,
16 the more other factors like commercialism will dominate.

17 "Also relevant to the first statutory factor is the
18 propriety of the accused infringer's conduct because fair use
19 presupposes good faith and fair dealing. Where, for example,
20 the intended purpose is to supplant the copyright holder's
21 commercially-valuable right of first publication, good faith is
22 absent.

23 "In evaluating the question of the propriety of Google's
24 conduct, meaning good faith or not, you may only consider
25 evidence up to the commencement of this lawsuit on August 12,

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1 2010 and may not consider events thereafter.

2 "Your decision as to fair use, however, will govern as to
3 all versions of Android at issue in this case, regardless of
4 the date of issue. Again, in evaluating good faith or not, you
5 should limit your consideration to events before August 12,
6 2010, and disregard any evidence you have heard after that
7 date. This evidence cutoff date applies only to the issue of
8 good faith or not.

9 "In evaluating the extent to which Google acted in good
10 faith or not, you may take into account, together with all
11 other circumstances, the extent to which Google relied upon or
12 contravened any recognized practices in the industry concerning
13 reimplementation of API libraries.

14 "You have heard evidence concerning the possibility of
15 Google asking"-- sorry.

16 "You have heard evidence concerning the possibility of
17 Google seeking a license from Oracle. Under the law, if the
18 accused use is otherwise fair, then no permission or license
19 need be sought or granted; thus, seeking or being denied
20 permission to use a work does not weigh against a finding of
21 fair use.

22 "Similarly, you have heard evidence about various licenses
23 from the Apache Foundation, the Apache Harmony Project
24 involving Java, and the general public license. These are
25 relevant in some ways, but Google concedes it had no license

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1 from Sun or Oracle, and it is important to remember that Google
2 makes no claim that its use was pursuant to a license from Sun
3 or Oracle directly or indirectly. Instead, Google claims that
4 its use was a fair use and therefore required no license at
5 all.

6 "The second statutory" -- so now we are up to the second
7 factor.

8 "The second statutory factor is the nature of the
9 copyrighted work. This factor recognizes that traditional
10 literary works are closer than informational works, such as
11 instruction manuals, to the core of intended copyright
12 protection. Creative writing and expression lie at the very
13 heart of copyright protection, so fair use is generally more
14 difficult to establish for copying of traditional literary
15 works than for copying of informational works.

16 "The focus of this statutory factor is on how close the
17 used material is to the core values of copyright protection.
18 The less the used material implicates the core values of
19 copyright protection, the more viable will be fair use and vice
20 versa.

21 "In this case, it is undisputed that the declaring code
22 and structure, sequence, and organization of the 37 API
23 packages at issue were sufficiently creative and original to
24 qualify for copyright protection.

25 "*Original*, as the term is used in copyright, means only

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1 that the work was independently created by the author as
2 opposed to copied from some other works and that it possesses
3 at least some minimal degree of creativity. The extent to
4 which the 37 API packages in question here involve greater
5 creativity than the minimum required to obtain copyright is
6 disputed and is open for you to examine; that is, you should
7 consider the extent to which the used materials were created
8 versus functional. The more creative the work, the more this
9 factor disfavors fair use. And the more functional the work,
10 the more this factor favors fair use.

11 "Even though a computer program performs functions and has
12 functional elements, the structure, sequence, and organization
13 of a computer program may be or may not be highly creative.
14 When there are many possible ways to structure, sequence, and
15 organize a program, the particular way chosen for a copyrighted
16 program and independent lines of declaring code may be or may
17 not be highly creative.

18 "On the other hand, when the declaring code and the
19 structure, sequence, and organization are dictated by
20 functional considerations such as efficiency, compatibility, or
21 industry standards, then less creativity is indicated and the
22 core values of copyright protection are less implicated.

23 "When purely functional elements are embedded in a
24 copyrighted work and it is necessary to copyright associated
25 creative elements in order to utilize those functional

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1 elements, then this circumstance also favors fair use.

2 Conversely, copying creative expression that is not necessary
3 to perform the functions cuts against fair use.

4 "Google, of course, had the right to write its own code,
5 to perform any function it wished, because no one can get a
6 copyright on a general method of operation other than to get a
7 copyright on its specific implementation for that function.
8 Unless it was a fair use, however, Google did not have the
9 right to use the exact lines of declaring code and the overall
10 structure, sequence, and organization of the 37 API packages as
11 copyrighted by Sun and now owned by Oracle.

12 "Because Google was free to use the Java programming
13 language to write Android, you should also consider the extent
14 to which you find it was necessary for Google to use any and
15 all of the declaring code and structure, sequence, and
16 organization of any of the 37 API packages to write in the Java
17 language. Such a finding to that extent only would support
18 fair use. To the extent that you find it was not necessary,
19 however, that finding would disfavor fair use.

20 "It is established that 170 lines of code at issue are
21 technically necessary to use the Java programming language.
22 Those 170 lines of declaring code are listed in Trial Exhibit
23 9223.

24 "Because that declaring code is necessary to use the
25 language, it is established that Google's use of the declaring

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1 code in Trial Exhibit 9223 was a fair use.

2 "It is for you to determine the extent to which other
3 additional declaring code beyond those lines identified in
4 Trial Exhibit 9223 either was or was not necessary for use of
5 the Java programming language. To the extent that you find
6 they were not necessary, you still must consider whether their
7 use was or was not a fair use in light of the statutory factors
8 for fair use.

9 "This consideration also bears on the third statutory
10 factor which I -- to which I will now turn.

11 "The third statutory factor is the amount and
12 substantiality of the portion used in relation to the
13 copyrighted work as a whole, which concerns how much of the
14 overall copyrighted work was used by the accused infringer.
15 Analysis of this factor is viewed in the context of Oracle's
16 copyrighted works, namely, Java 2 Standard Edition Versions 1.4
17 and 5.0. For this factor, the total number of lines in Android
18 is irrelevant.

19 "The fact, if true, that a substantial portion of an
20 infringing work was copied verbatim is evidence of the
21 qualitative value of the copied material, both to the
22 originator and to whoever seeks to profit from marketing
23 someone else's copyrighted work.

24 "Wholesale copying does not preclude fair use per se, but
25 it militates against a finding of fair use. Even a small part

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1 may be qualitatively the most important part of a work. If,
2 however, the secondary user only copies as much as is necessary
3 for a transformative use, then this factor will not weigh
4 against him or her. The extent of permissible copying varies
5 with the purpose and character of the use which relates back to
6 the first statutory factor.

7 "In assessing this third statutory factor, both the
8 quantity of the material used and the quality or importance of
9 the material used should be considered.

10 "The fourth and final statutory factor is the effect of
11 the accused infringer's use on the potential market for or
12 value of the copyrighted work. This factor militates against
13 fair use if the accused use materially impairs the
14 marketability or value of the copyrighted work. This is the
15 single most important statutory factor. But it must be weighed
16 with all other factors and is not necessarily dispositive.

17 "This factor considers whether the accused work is offered
18 or used as a substitute for the original copyrighted work.
19 This factor considers not only the extent of any market harm
20 caused by the accused infringer's actions, but also whether
21 unrestricted and widespread use of the copyrighted materials of
22 the sort engaged in by the accused infringer would result in a
23 substantially-adverse impact on the potential market for the
24 copyrighted work.

25 "Market harm to the value of the copyrighted work may be a

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1 matter of degree, and the importance of this factor will vary
2 not only with the amount of harm shown, but also with the
3 relative strengths of the showings on the other factors.

4 "In connection with the fourth statutory factor, the term
5 *potential market for or value of* refers to the value of the
6 entire copyrighted work itself and licensing opportunities for
7 the copyrighted work and its derivative works.

8 "A derivative work is a work based in whole or in
9 substantial part upon one or more preexisting copyrighted works
10 such as a musical arrangement or a dramatization based upon a
11 book, to name only two specifics, or any other form in which a
12 work may be recast or adapted. In this case, the copyrighted
13 works in suit are Java 2 Standard Edition Versions 1.4 and 5.0.
14 So the only derivative works that count are those derived from
15 those two works.

16 "In making your evaluation under the fourth factor, you
17 should assess the harm, if any, to the potential market for or
18 value of the copyrighted work itself and to its licensing value
19 for it and its derivative works. You may consider the broader
20 potential market for products that feature independent elements
21 in addition to the copyrighted material and their successes
22 and/or failures only to the extent that they shed light on the
23 licensing or market value of the copyrighted work itself and
24 its derivative works. In doing this, moreover, you must ignore
25 benefits from the use to the copyrighted owner outside the

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1 genre claimed to have been harmed.

2 "Actual present harm need not be shown nor is it necessary
3 to show with certainty that future harm will result so long as
4 some meaningful likelihood of future harm exists to the market
5 value of the copyrighted work or the licensing value for the
6 copyrighted work and its derivative work and traditional,
7 reasonable, or likely-to-be-developed markets. If the intended
8 accused use is for commercial gain, that likelihood may be
9 presumed except where the second use is transformative, because
10 in cases of transformation, market substitution is at least
11 less certain and market harm may not be so readily inferred.

12 "I have now completed my explanation of the four factors
13 under the act. You might ask, are we limited to these four
14 factors?

15 "The act states that the factors to be considered include
16 the four statutory factors, and the law holds that those four
17 factors are not exclusive and you may consider any additional
18 circumstances and evidence, pro or con, that in your judgment
19 bear upon the ultimate purpose of the Copyright Act, including
20 protection of authors and the right of fair use, namely, to
21 promote the progress of science and useful arts.

22 "It is up to you to decide whether all relevant factors,
23 when considered fully and together, favor or disfavor fair use.
24 All of these factors must be explored, discussed, and evaluated
25 by you. No single factor is dispositive. Your evaluation of

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1 all factors must be weighed together in light of the purpose of
2 copyright, which, as our Constitution states in enumerating the
3 legislative power of Congress, is to promote the progress of
4 science and useful arts.

5 "Some factors may weigh in favor of fair use and some
6 against fair use, and you must decide, after giving the factors
7 such weight as you find appropriate based on the evidence and
8 my instructions, whether or not on balance Google has shown by
9 a preponderance of the evidence that they predominate in favor
10 of fair use.

11 "I'm now coming to the last closing instructions. When
12 you begin your deliberations, you should elect one member of
13 your jury as your foreperson. That person will preside over
14 the deliberations and speak for you here in court.

15 "You will then discuss the case with your fellow jurors to
16 reach agreement, if you can do so. Your verdict must be
17 unanimous." One hundred percent. I'm going to repeat that.

18 "Your verdict must be unanimous," meaning all 10 of you
19 must agree.

20 "Each of you must decide the case for yourself, but you
21 should do so only after you have considered all the evidence,
22 discussed it fully with the other jurors, and listened to the
23 views of your fellow jurors. Do not be afraid to change your
24 opinion if the discussion persuades you that you should. Do
25 not come to a decision simply because other jurors think it is

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1 right.

2 "It is important that you attempt to reach a unanimous
3 verdict, but, of course, only if each of you can do so after
4 having made your own conscientious decision. Do not change an
5 honest belief about the weight and effect of the evidence
6 simply to reach a verdict.

7 "I will give you a special verdict form to guide your
8 deliberations.

9 "Some of you have taken notes during the trial. Whether
10 or not you took notes, you should rely on your own memory of
11 what was said. Notes are only to assist your memory. You
12 should not be overly influenced by the notes.

13 "When you go into the jury room, the clerk will bring into
14 you the trial exhibits received into evidence to be available
15 for your deliberations. The clerk will also provide you with
16 an index to them.

17 "As I noted before the trial, when you retire to the jury
18 room to deliberate, you will have with you the following
19 things: All of the exhibits received into evidence, an index
20 of the exhibits," and I'll pause here to say there is going to
21 be one that is done by trial exhibit number, an index, and
22 there will be another index that is done by chronological
23 order. And actually there is going to be a third index, which
24 is a shorter one that's for those video depositions that were
25 shown by video on the screen. Sometimes they referred to

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1 deposition exhibits and they used different trial numbers here
2 at trial. So there is going -- to be to complicate your lives,
3 I'm going to have a translation chart as well. That won't come
4 up as often, but it will come up occasionally and you'll have
5 that index as well.

6 Now, these indexes themselves are not evidence, but
7 they're there for your -- to help you sort through the
8 material.

9 "In addition, you will have a work copy of these jury
10 instructions. Each of you will get your own copy. Each of you
11 will get a work copy of the verdict form," which in this case
12 is just one question. And then there will be the official
13 verdict form.

14 "When you recess at the end of the day, please place your
15 work materials in the brown envelope provided and cover up any
16 easels with your work."

17 By the way, we're also going to send in that big -- the
18 big poster board. It might be helpful for any group
19 discussions to have the big timeline in the jury room, unless
20 you feel like you don't need it. Then you can send it back
21 out. But we'll send it in for starters.

22 "When you recess at the end of the day, please place your
23 work materials in the brown envelope provided and cover up any
24 easels with your work notes so that if my staff needs to go
25 into the jury room for any reason, they will not even

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1 inadvertently see any of your work in progress."

2 We try to stay out of there whenever you're deliberating.
3 Occasionally there is an emergency, so we have to go in there.
4 So when you leave for the day, just make sure we don't -- we
5 won't see any of your work in progress.

6 "A court security officer will be outside the jury room
7 door during your deliberations. If it becomes necessary during
8 your deliberations to communicate with me, you may send a note
9 through the officer signed by your foreperson or by one or more
10 members of the jury. No member of the jury should ever attempt
11 to communicate with me, except by a signed writing, and I will
12 respond to the jury concerning the case only in writing or here
13 in open court.

14 "If you do send out a question, I will consult with the
15 lawyers before answering it, which may take some time."

16 Let me repeat that.

17 "If you do send out a question, I will consult with the
18 lawyers before answering it, which may take some time. You may
19 continue your deliberations while waiting for any answer to any
20 question.

21 "Remember, that you are not to tell anyone, including me,
22 how the jury stands numerically or otherwise until after you
23 have reached a unanimous verdict or have been discharged.

24 "Do not disclose any vote count in any note to the Court."
25 We don't want to know how you stand. It could be 9 to 1, it

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1 could be 5 to 5. We don't want to know any of that. We just
2 want to know when it's unanimous. Please don't tell us how, if
3 you send out a note, how the jury stands in any way.

4 "You have been required to be here each today from 7:45 to
5 1:00 p.m. Now that you are going to begin your deliberations,
6 you are free to modify this schedule within reason. For
7 example, if you wish to continue deliberating in the afternoons
8 after a lunch break, that's fine."

9 I will skip the rest of this because I understand you are
10 going to break at 1:00 each day this week anyway. Is that
11 true? I think that's what -- but it's up to you. We will stay
12 here until midnight if that's what you want. You are the boss
13 in just a few minutes.

14 "If you do not reach a verdict by the end of today, then
15 you will resume your deliberations tomorrow and thereafter. It
16 is very important that you let us know via the officer what
17 your hours will be so that the lawyers may always be present in
18 the courthouse at any time the jury is deliberating."

19 So we're going to be waiting out here doing other work, I
20 guess, but we'll be waiting and be at your convenience while
21 you're deliberating -- as long as you're deliberating each day.

22 "Now, you may only deliberate when all of you are
23 together." This is important. "You may only deliberate when
24 all of you are together. This means, for instance, that in the
25 mornings before everyone has arrived or when someone steps out

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1 of the jury room to go to the restroom, you may not discuss the
2 case. As well, the admonition that you are not to speak with
3 anyone outside the jury room about this case still applies
4 during your deliberations.

5 "Once you render a verdict on" -- okay. Down to two more
6 paragraphs.

7 "Once you render a verdict on the fair use question, we
8 may proceed to the shorter and final phase of the trial on
9 damages issue, depending on your answer to the fair use
10 question.

11 "This would still be within the June 10th end date as
12 stated earlier. Please do not allow any desire to complete
13 trial sooner to influence your thinking. Once you render your
14 verdict on the fair use issue, it will be final and may not be
15 revisited or modified during the second phase.

16 "After you have reached a unanimous agreement on a
17 verdict, your foreperson will fill in, date, and sign the
18 verdict form and advise the Court that you have reached a
19 verdict. The foreperson should hold on to the filled-in
20 verdict form and bring it into the courtroom when the jury
21 returns the verdict.

22 "Thank you for your careful attention. The fair use issue
23 is now in your hands. You may now retire to the jury room and
24 begin your deliberations."

25 (Proceedings were heard out of presence of the jury:)

PROCEEDINGS

1 **THE COURT:** Counsel, I just realized as they left that
2 I did not tell them about the videos on the court computer
3 system. What I will do is ask Dawn to just wheel that in there
4 and tell them that it includes the videotaped depositions that
5 they saw. Is that acceptable?

6 **MS. HURST:** It's not the depositions, Your Honor.
7 It's other videos that were evidentiary materials, because the
8 depositions would be transcripts.

9 **THE COURT:** You're right.

10 **MS. HURST:** The transcripts don't go into the jury
11 room.

12 **THE COURT:** You're right. Tell me what is on there
13 again.

14 **MS. HURST:** Materials that exist solely in electronic
15 form such as source code, videotapes --

16 **THE COURT:** The source code is on there?

17 **MS. HURST:** Yes.

18 **THE COURT:** It's not -- that's not in written form?

19 **MS. HURST:** It's only in electronic form.

20 **THE COURT:** Materials in electronic form, exhibits --
21 exhibits in electronic form; right?

22 **MS. HURST:** Yes.

23 **THE COURT:** Exhibits only in electronic form on
24 computer; right?

25 **MS. HURST:** Right.

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1 **THE COURT:** Is that right?

2 **MR. MULLEN:** That's right, Your Honor.

3 **THE COURT:** Dawn, would you take this note, and
4 whenever you wheel it in there, tell them that's what on there.

5 **THE CLERK:** Yes.

6 **THE COURT:** Any objection to that?

7 **MS. HURST:** No.

8 **THE COURT:** Yes/no? Any objection to Dawn telling
9 them what's on the computer?

10 **MR. VAN NEST:** No, Your Honor.

11 **THE COURT:** All right. Thank you. Okay.

12 Anything that the lawyers need the Court for?

13 **MS. HURST:** Your Honor, we were hoping we might
14 discuss what schedule for Phase 2 would look like under various
15 scenarios were it to come to pass.

16 **THE COURT:** Well, today I'm going to send out to you a
17 set of damages instructions and verdict form so we can have an
18 opportunity to be studying that during the deliberations. If
19 the jury returns a verdict and there is enough time to do it,
20 we should start in immediately on the opening statements for
21 the next phase. And I think 30 minutes per side ought to be
22 plenty of time for the next phase.

23 So if we -- and I would pre-instruct along the lines of
24 what I'm going to send out to you, but it's like I did before,
25 a draft. I want to get your critiques on it. But on the other

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1 hand, if we're too close to the end of the day, then we'll
2 start the next day, the next court day. That's what I think.

3 I'm happy to hear what your proposals are.

4 **MS. HURST:** Your Honor, Professor Kearl, I believe,
5 had asked for 24-hour notice between a verdict and starting the
6 damages phase, and I thought the Court had earlier adopted that
7 suggestion. So we were sort of operating under that
8 assumption. It may be erroneous, but I just thought I would
9 raise that issue. I don't know if Mr. Cooper is still here or
10 not.

11 **THE COURT:** I think they left.

12 **MR. VAN NEST:** Your Honor, there is a related issue,
13 which is just kind of disclosures and getting ready. We
14 haven't had any -- obviously Oracle would proceed first in a
15 damages phase, and what I was going to suggest is that perhaps
16 we just assume we're going to start Wednesday morning for
17 purposes of argument and get our disclosure on witnesses today,
18 as we would have, you know, in the ordinary course. Otherwise,
19 if we go right into it, then we'll be at a big disadvantage.
20 We won't have any notice of which witness is first --

21 **THE COURT:** I think you ought to assume the most
22 practical thing here, which is assume we're going to go to
23 Phase 2, because otherwise it doesn't matter.

24 **MR. VAN NEST:** Right.

25 **THE COURT:** So we should go on the assumption that

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1 does matter, which is that -- and not inconvenience the jury.

2 So I think you should be giving your notices. Oracle should be
3 giving notices of the witnesses, and it's a different question
4 about whether or not -- I have forgotten what Professor Kearl
5 wanted. I have to go back and look and see. I don't remember
6 agreeing to that, but maybe I did.

7 You all ought to know exactly who you are going to call
8 for your first witnesses. That ought to be ready to go, and
9 you should know who they are and be getting your
10 counter-designations. All of that should be rolling right
11 ahead.

12 **MR. VAN NEST:** Right.

13 **THE COURT:** Wednesday -- there is no way they are
14 going to get a verdict today. But they could get a verdict
15 tomorrow. And they might go all the way to Friday of this
16 week. I don't know. Let's operate on a Wednesday morning
17 assumption for purposes of getting your disclosures going so
18 that we can have that piece all set and ready to go without
19 each side contending they were sandbagged.

20 **MR. VAN NEST:** That sounds good, Your Honor.

21 **MS. HURST:** Your Honor, I think that works except for
22 the demonstratives, which are on 48-hour notice, and I don't
23 think we're going to have all our demonstratives ready today.
24 I would ask to put that on 24 --

25 **THE COURT:** You can do that one on 24 for this one

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1 exception.

2 **MS. HURST:** Your Honor, there is one other thing I
3 wanted to raise, which was that Google made an objection to had
4 Dr. Reinhold reappearing during the case, during a surrebuttal
5 case.

6 We would like to bring Dr. Reinhold back for the damages
7 case, and we have excluded him from the courtroom continuously
8 since they made that objection. He did not hear the rebuttal
9 testimony of Dr. Astrachan. And so we would like to be able to
10 bring him back for the damages case.

11 **THE COURT:** Any objection?

12 **MR. VAN NEST:** I think it's still improper,
13 Your Honor, particularly in light of the nature of his
14 testimony, which was to the effect that he was closely and
15 deeply involved with their experts. He's the one that tried to
16 fix, quote/unquote, the testimony of Mr. Smith. He's clearly
17 deeply engaged as an advocate in this.

18 **THE COURT:** Well, they are all. All these experts
19 are.

20 **MR. VAN NEST:** But he is an employee. He's an
21 employee of Oracle. So, again, I don't think it's proper. If
22 they wanted to use him further, he should not have been allowed
23 to sit in the courtroom.

24 **THE COURT:** Somebody is over there -- Dawn, would you
25 take that person a cough drop so that they cannot interrupt the

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1 proceedings.

2 **MS. HURST:** Your Honor, the only witnesses he heard
3 were Oracle's witnesses. It was during our case that he was
4 excused. And we excluded him during the rebuttal case because
5 they raised the objection. He wasn't even here for closing
6 arguments today. We kept him out because, you know, we don't
7 think the objection has merit, Your Honor. But we kept him out
8 in abundance of caution.

9 **THE COURT:** Is he going to be addressing things that
10 came up during the first phase?

11 **MS. HURST:** Your Honor, we anticipate that he will
12 address further the importance of APIs and related issues. So
13 generally as a topic, yes. But, I mean, we have always had
14 this in two phases so some things could be in the damages case.

15 **MR. VAN NEST:** I just don't see any reason to have an
16 exception for him, especially for him, to have him in his
17 position have sat through the bulk of the trial after he
18 testified. It's just not fair. It puts him on a different
19 footing than any other witness that we're going to hear from,
20 other than the experts who have been here. And it's not fair
21 to --

22 **THE COURT:** What was your explanation -- I have
23 forgotten what your explanation was. Did you treat him like an
24 expert?

25 **MS. HURST:** Your Honor, it was an oversight. It was

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1 just purely an oversight on our part. It was inadvertence.

2 **THE COURT:** Look, do you care strongly enough about
3 this, Mr. Van Nest, to submit a written brief? Or do you --

4 **MR. VAN NEST:** Yes, I do.

5 **THE COURT:** Then -- submit your brief --

6 **MR. VAN NEST:** They have so many experts. They have
7 so many experts that can --

8 **THE COURT:** You submit your brief tonight. We will
9 decide it later. Okay?

10 **MR. VAN NEST:** Okay.

11 **MS. HURST:** Thank you, Your Honor.

12 **THE COURT:** What else do you want to go over?

13 **MR. VAN NEST:** Mr. Mullen has something to hand up.

14 **MR. MULLEN:** This is the revised version of the depo
15 translation sheet. This just reflects the exhibits that were
16 used in actual video depositions, not the read-ins.

17 **THE COURT:** That's how I got confused by the video
18 thing.

19 **MS. HURST:** Have we seen this? Chris, have you seen
20 this? She is nodding no.

21 **THE COURT:** Whenever you all agree on it, give it to
22 Dawn, and she'll take it in.

23 **MR. VAN NEST:** Your Honor, could I just have a brief
24 proffer of what they want to call Dr. Reinhold about? Maybe we
25 can resolve it. But I don't know what it is that exactly they

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1 want to do.

2 **THE COURT:** I suggest this. That by p.m., you make
3 the proffer in writing because I need to get some stuff into
4 the jury room, like the instructions and so forth. So then
5 that will give you a chance to try to work it out overnight.

6 **MR. VAN NEST:** Thank you.

7 **MS. HURST:** Thank you, Your Honor.

8 **THE COURT:** What else?

9 **MR. VAN NEST:** That's it from us.

10 **THE COURT:** What I'm going to do is go get these
11 instructions. I made very small corrections as I went along.
12 They're not controversial. I will get those done, sign them,
13 send them into the jury room with the verdict form.

14 Dawn should get the exhibits sent in. We've got a lot of
15 mechanical things to take care of right now.

16 And I know that they're only going to be here 20 more
17 minutes, so I would like to have them completely set up with
18 what they need to do business in the morning before they leave
19 for the day.

20 We'll be in adjournment for a bit, and as soon as we know
21 who the foreperson and all that is, we'll let you know. We'll
22 also let you know when they leave for the day.

23 **MR. VAN NEST:** Thank you, Your Honor.

24 **THE COURT:** Thank you.

25 **MS. HURST:** Thank you.

PROCEEDINGS

(At 12:39 p.m. the proceedings were adjourned until
Tuesday, May 24, 2016.)

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CERTIFICATE OF REPORTERS

We certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: May 23, 2016

Katherine Sullivan

Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter

Pamela A. Batalo

Pamela A. Batalo, CSR No. 3593, RMR, FCRR
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